

# University of Missouri School of Law Scholarship Repository

---

Faculty Publications

---

Winter 2012

## What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act

S. I. Strong

*University of Missouri School of Law*, [strongsi@missouri.edu](mailto:strongsi@missouri.edu)

Follow this and additional works at: <http://scholarship.law.missouri.edu/facpubs>



Part of the [Dispute Resolution and Arbitration Commons](#), [International Law Commons](#), and the [International Trade Commons](#)

---

### Recommended Citation

S.I. Strong, What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act, 48 Stan. J. Int'l L. 47 (2012)

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

# WHAT CONSTITUTES AN “AGREEMENT IN WRITING” IN INTERNATIONAL COMMERCIAL ARBITRATION? CONFLICTS BETWEEN THE NEW YORK CONVENTION AND THE FEDERAL ARBITRATION ACT

S.I. STRONG\*

*This Article investigates whether and to what extent a party must produce an “agreement in writing” when seeking to enforce an international arbitration agreement or award in a U.S. federal court. This issue has recently given rise to both a circuit split and a petition for certiorari to the U.S. Supreme Court, and involves matters of formal validity as well as federal subject matter jurisdiction. The problem arises out of subtle differences in the way an “agreement in writing” is defined in the Federal Arbitration Act (FAA) and the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).*

*This is not just a U.S. problem, however. Questions relating to form requirements under the New York Convention have also been much discussed at the international level, with UNCITRAL recently issuing a formal recommendation on how to deal with the problem.*

*This Article describes the scope of the current problems associated with form requirements, including how inconsistencies in domestic practice affect international commercial arbitration and global trade. After discussing the difficulties in both the U.S. and the international sphere, the Article makes a number of suggestions for legislative and judicial reform. This is the first article to discuss the circuit split and associated issues in the context of the FAA and to take a serious comparative look at the implementation of the UNCITRAL recommendation at the international level.*

I. INTRODUCTION.....	48
----------------------	----

II. "AN AGREEMENT IN WRITING"—DIFFICULTIES AND DILEMMAS UNDER U.S. LAW.....	52
A. Statutory Analysis.....	54
B. U.S. Case Law .....	58
1. Cases Analyzed Under Article II(2) of the New York Convention .....	58
a. Arbitral clauses or agreements .....	59
b. Exchange of letters or telegrams .....	63
2. Cases Analyzed Under Section 2 of the FAA.....	65
3. Cases Analyzed Under Both Article II(2) of the New York Convention and Section 2 of the FAA.....	68
C. Conclusions Regarding the Form Requirement Under U.S. Law.....	69
III. INTERNATIONAL ISSUES REGARDING THE FORM REQUIREMENT OF THE NEW YORK CONVENTION.....	70
A. International Interpretation of Article II(2) of the New York Convention ...	72
B. International Interplay Between Article II(2) and Article VII(1) of the New York Convention.....	74
C. UNCITRAL Recommendation.....	78
D. The UNCITRAL Model Arbitration Law.....	80
IV. FUTURE DIRECTION OF U.S. LAW CONCERNING FORM REQUIREMENTS .....	82
A. Adoption of an Expansive Reading of Article II(2) of the New York Convention.....	84
B. Explicit Adoption of Domestic Legal Standards Through Reliance on Article VII(1) of the New York Convention .....	86
C. Adoption of Article 7 of the UNCITRAL Model Arbitration Law .....	89
V. CONCLUSION .....	91

## I. INTRODUCTION

At first glance, the term “agreement in writing” appears relatively easy to define, apply and understand. However, as with most things in law, the task has proven much more difficult in practice than in theory.

Indeed, U.S. federal courts have experienced a number of problems when interpreting this phrase, which appears in article II(2) of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention.<sup>1</sup> Not only is there a circuit split on how to define the term itself, there are also growing inconsistencies regarding the

---

\* Ph.D. (law), University of Cambridge (U.K.); D.Phil., University of Oxford (U.K.); J.D., Duke University; M.P.W., University of Southern California; B.A., University of California, Davis. The author, who is admitted to practice as an attorney in New York and Illinois and as a solicitor in England and Wales, is Associate Professor of Law at the University of Missouri and Senior Fellow at the Center for the Study of Dispute Resolution. This Article was drafted during a Visiting Fellowship at the Lauterpacht Centre for International Law at the University of Cambridge (U.K.), and the author gratefully acknowledges the kind assistance of the staff and fellows during that time.

<sup>1</sup> See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention].

proper relationship between article II(2) of the New York Convention and the various provisions of the Federal Arbitration Act (FAA)<sup>2</sup> that describe the need for a written arbitration agreement in disputes arising under the New York Convention.<sup>3</sup>

In fact, certiorari was recently sought from the U.S. Supreme Court on precisely this issue, stating the question presented was “the proper scope and application of article II(2) of the Convention, relating to when an arbitration clause must be ‘signed by the parties or contained in an exchange of letters or telegrams’” and noting a “split of authority” on this matter.<sup>4</sup> Similar questions have brought to the attention of the Supreme Court several times over the last few years, demonstrating an increased interest in this issue as well as the need for greater guidance from the Court.<sup>5</sup> Given the Supreme Court’s current interest in arbitration,<sup>6</sup> it is altogether possible that certiorari will be granted on this issue at some point in the near future.

In the meantime, the confusion that surrounds the interpretation and application of article II(2) of the New York Convention has not only generated a great deal of debate among scholars and practitioners,<sup>7</sup> but it has also led to a great

<sup>2</sup> See 9 U.S.C. §§ 2, 202 (2006).

<sup>3</sup> See New York Convention, *supra* note 1, art. II(2).

<sup>4</sup> See Petition for Writ of Certiorari, *Nielson v. Seaboard Corp.*, No. 08-65, 2008 WL 2773349, at \*i (U.S. July 14, 2008).

<sup>5</sup> See New York Convention, *supra* note 1, art. II; Petition for Writ of Certiorari, *Slaney v. Int’l Amateur Athletic Fed’n*, No. 00-1941, 2001 WL 34125352, at \*18, 21 (U.S. June 25, 2001) (claiming estoppel was insufficient grounds for meeting article II form requirement); Petition for Writ of Certiorari, *Ruhrgas AG v. Marathon Int’l Oil Co.*, No. 97-409, 1997 WL 33549149, at \*18–19 (U.S. Sept. 8, 1997) (requesting interpretation of article II’s effect on non-signatories); see also Supplemental Brief for Petitioner, *Louisiana Safety Ass’n of Timbermen – Self Insurers Fund v. Certain Underwriters at Lloyd’s*, London, No. 09-945, 2010 WL 3501249, at \*7–10 (U.S. Sept. 8, 2010) (primarily involving article II(3), but noting issues relating to the intersection between article II of the New York Convention and section 202 of the FAA); Petition for Writ of Certiorari, *Jacada (Europe), Ltd. v. Int’l Mktg. Strategies, Inc.*, No. 05-261, 2005 WL 2072285, at \*i (U.S. Aug. 24, 2005) (noting the question presented was whether the court of appeals had “improperly expanded federal subject matter jurisdiction by going beyond the clear language of Section 202 of the Federal Arbitration Act, 9 U.S.C. § 202, and instead ruling that the court could ‘craft’ a ‘general definition’ from that statute as to whether an arbitration award is ‘domestic’ and thus vests the court with jurisdiction”); *Uzan v. Motorola Credit Corp.*, No. 04-1255, 2005 WL 899480, at \*22–27 (U.S. Apr. 14, 2005) (involving choice of law issues affecting interpretation of article II).

<sup>6</sup> Recent cases have included *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), *Granite Rock Co. v. Int’l Brotherhood of Teamsters*, 130 S. Ct. 2847 (2010), *Rent-a-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010), *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009), *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009), and *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

<sup>7</sup> For commentary in this area, see GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 580–619 (2009); Guillermo Aguilar Alvarez, *Article II(2) of the New York Convention and the Courts, in IMPROVING THE EFFICIENCY OF ARBITRATION AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION*, at 67, 68–81 (Albert Jan van den Berg ed., 1999) [hereinafter EFFICIENCY]; Marc Blessing, *The Law Applicable to the Arbitration Clause and Arbitrability*, in EFFICIENCY, *supra*, at 168, 172; Roman Chapaev & Veronica Bradautanu, *International Commercial Arbitration in the CIS and Mongolia*, 17 AM. REV. INT’L ARB. 411, 425–30 (2006); Domenico di Pietro, *Incorporation of Arbitration Clauses by Reference*, 21 J. INT’L ARB. 439, 439–50 (2004); Wilhelm Haarmann, *The Written Form Requirement for the Recognition of Foreign Arbitral Awards in Germany*, 15 IBA ARB. NEWS 126 (Mar. 2010); Philipp Habegger, *Extension of Arbitration Agreements to Non-Signatories and Requirements of Form*, 22 ASA BULL. 398, 403–05 (2004); Gerold Herrmann, *Does the World Need Additional Uniform Legislation on Arbitration?*, 15 ARB. INT’L 211, 215–16 (1999); James M. Hosking, *The Third Party Non-Signatory’s Ability to Compel International Commercial Arbitration:*

deal of litigation.<sup>8</sup> Disputes about the New York Convention's "form requirements" are problematic for two reasons.<sup>9</sup>

First, litigation is both expensive and time consuming for the parties. This is particularly troubling when the dispute involves a highly technical jurisdictional issue that is "unnecessary and instead serve[s] to frustrate commercial parties' legitimate expectations and rights."<sup>10</sup> Second, litigation regarding the application of the New York Convention is inconsistent with the heightened need for predictability in the resolution of international commercial disputes, a principle that has been recognized by the U.S. Supreme Court on numerous occasions.<sup>11</sup>

Notably, the United States is not the only nation facing difficulties interpreting and applying article II(2) of the New York Convention.<sup>12</sup> To the contrary, the Secretary General of the United Nations has stated that:

[i]t has been repeatedly pointed out by practitioners that there are a number of situations where the parties have agreed to arbitrate (and there is evidence in writing about the agreement), but where, nevertheless, the validity of the agreement is called into question because of the overly restrictive form requirement. The conclusion frequently drawn from those situations is that the definition of writing, as contained in [various] international legislative texts, is not in conformity with international contract practices and is detrimental to the legal certainty and predictability

---

*Doing Justice Without Destroying Consent*, 4 PEPPERDINE DISP. RESOL. J. 469, 557–58 (2004); Neil Kaplan, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?*, 12 ARB. INT'L 27, 30–35, 43 (1996); Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17, 67 (2002); Peter Kucherepa, *Reviewing Trends and Proposals to Recognize Oral Agreements to Arbitrate in International Arbitration Law*, 16 AM. REV. INT'L ARB. 409, 412–14, 418–21 (2005); Toby Landau, *The Requirement of a Written Form for an Arbitration Agreement: When "Written" Means "Oral," in INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS* 19, 25–33 (Albert Jan van den Berg ed., 2003); Dirk Otto, *Article IV, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION* 143, 158–76 (Herbert Kronke et al. eds., 2010) [hereinafter RECOGNITION AND ENFORCEMENT]; Andreas Reiner, *The Form of the Agent's Power to Sign an Arbitration Agreement and Article II(2) of the New York Convention*, in EFFICIENCY, *supra*, at 82, 83–90; Dorothee Schramm et al., *Article II, in RECOGNITION AND ENFORCEMENT, supra*, at 37, 73–94 (2010); Renaud Sorieul, *The Influence of the New York Convention on the UNCITRAL Model Law on International Commercial Arbitration*, 2 DISP. RESOL. INT'L 27, 39–41 (2008); Renaud Sorieul, *UNCITRAL's Current Work in the Field of International Commercial Arbitration*, 22 J. INT'L ARB. 543, 543–44, 547–49 (2005); Vera van Houtte, *Consent to Arbitration Through Agreement to Printed Contracts: The Continental Experience*, 16 ARB. INT'L 1, 2–15 (2000); Jing Wang, *International Judicial Practice and the Written Form Requirement for International Arbitration Agreements*, 10 PAC. RIM L. & POL'Y J. 375, 376–81 (2001); Yongping Xiao & Weidi Long, *Enforcement of International Arbitration Awards in Chinese Courts*, 25 ARB. INT'L 569, 570 (2009).

<sup>8</sup> See *infra* notes 23–175 and accompanying text.

<sup>9</sup> See BORN, *supra* note 7, at 580–81 (defining "form requirements").

<sup>10</sup> *Id.* at 619.

<sup>11</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538 (1995); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974).

<sup>12</sup> See New York Convention, *supra* note 1, art. II(2); United Nations Comm'n on Int'l Trade Law (UNCITRAL), Working Grp. II (Arbitration), *Preparation of Uniform Provisions on Written Form for Arbitration Agreements, Note by the Secretariat*, ¶ 35, U.N. Doc. A/CN.9/WG.II/WP.139 (Dec. 14, 2005) [hereinafter UNCITRAL Note]; Landau, *supra* note 7, at 37–41.

of commitments entered into in international trade.<sup>13</sup>

The growing international inconsistency regarding article II(2) recently led United Nations Commission on International Trade Law (UNCITRAL) to develop and adopt a recommendation regarding the interpretation and application of this provision (UNCITRAL Recommendation).<sup>14</sup> Although the UNCITRAL Recommendation has only been in place a short time and has not yet been considered by a U.S. state or federal court, the Recommendation provides several straightforward solutions to the interpretive problems experienced in the United States.<sup>15</sup>

This Article therefore has a twofold aim: first, to identify whether there is a problem with the manner in which U.S. law applies and interprets article II(2) of the New York Convention, particularly in light of international legal norms, and second, if a problem does exist, to provide a realistic proposal for improving the situation.<sup>16</sup> To that end, the discussion proceeds as follows.

First, Section II describes the current state of U.S. law regarding the interpretation and application of article II(2) of the New York Convention.<sup>17</sup> In so doing, the discussion sets forth the text of both the New York Convention and the FAA and discusses the ways in which the various provisions interact.<sup>18</sup> The analysis also introduces U.S. judicial opinions construing the New York Convention and the FAA and discusses the various lines of precedent.<sup>19</sup>

Section III then takes the Article into the international realm by considering how other national courts and legislatures have addressed the New York Convention's form requirements.<sup>20</sup> This portion of the analysis introduces the UNCITRAL Recommendation and evaluates how that document affects the interpretive issues facing U.S. and other courts.

Next, Section IV considers ways to address the problems experienced in the United States and suggests a more cohesive and jurisprudentially consistent approach to the form requirements reflected in article II(2) of the New York Convention.<sup>21</sup> Section V then concludes the Article by wrapping up the various threads of discussion and providing some final thoughts.

Having described the basic framework for analysis, it is time to begin the substantive discussion. The first item to address involves current U.S. law and

---

<sup>13</sup> UNCITRAL, Working Grp. II (Arbitration), *Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement, Report of the Secretary General*, ¶ 7, U.N. Doc. A/CN.9/WG.II/WP.108/Add.1 (Jan. 26, 2000) [hereinafter SG Report].

<sup>14</sup> See New York Convention, *supra* note 1, art. II(2); UNCITRAL, *Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. A/61/17 (July 7, 2006) [hereinafter UNCITRAL Recommendation].

<sup>15</sup> See UNCITRAL Recommendation, *supra* note 14; see also *infra* notes 245–323 and accompanying text.

<sup>16</sup> See New York Convention, *supra* note 1, art. II(2).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*; Federal Arbitration Act, 9 U.S.C. §§ 2, 202 (2011).

<sup>19</sup> See New York Convention, *supra* note 1, art. II(2); 9 U.S.C. §§ 2, 202.

<sup>20</sup> See New York Convention, *supra* note 1, art. II(2).

<sup>21</sup> See *id.*

practice regarding the interpretation and application of article II(2) of the New York Convention.<sup>22</sup>

## II. "AN AGREEMENT IN WRITING"—DIFFICULTIES AND DILEMMAS UNDER U.S. LAW

As it turns out, two types of difficulties exist with respect to the way the United States interprets and applies article II(2) of the New York Convention.<sup>23</sup> First, problems arise with respect to the language of the New York Convention itself.<sup>24</sup> Second, complications arise when the language of the New York Convention is brought into contact with the text of the FAA.<sup>25</sup> Both of these issues are addressed below.<sup>26</sup>

Before beginning, however, it is important to establish the boundaries of the analysis. First, the following discussion focuses on a very narrow issue, namely the interpretation of article II(2) of the New York Convention and its application to disputes arising in U.S. courts through the various provisions of the FAA.<sup>27</sup> The question, as shall be seen, is a jurisdictional one rather than a substantive one.<sup>28</sup> Therefore, this Article will not discuss issues relating to the substantive validity of an agreement to arbitrate, including the vast majority of issues regarding the rights and obligations of non-signatories.<sup>29</sup>

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*; Federal Arbitration Act, 9 U.S.C. §§ 2, 202 (2011).

<sup>26</sup> See *infra* notes 35–175 and accompanying text.

<sup>27</sup> See New York Convention, *supra* note 1, art. II(2); 9 U.S.C. §§ 2, 202. A variety of motions relating to the New York Convention can be brought in U.S. courts under the FAA. See 9 U.S.C. § 205 (involving motion to remove case from state court); *id.* § 206 (involving motion to compel arbitration or appoint arbitrators); *id.* § 207 (involving motion to confirm an award). Other motions can be brought under the provisions of Chapter 1 of the FAA, using the “residual application” provision of Chapter 2. See *id.* § 3 (involving stay of litigation); *id.* § 4 (involving procedural aspects of compelling arbitration); *id.* § 7 (involving attendance of witnesses); *id.* § 10 (involving vacatur); *id.* § 11 (involving modifications or corrections of the award); *id.* § 16 (involving appeals); *id.* § 208 (involving residual application of Chapter 1). The interaction between Chapter 1 and Chapter 2 of the FAA is discussed below. See *id.*; see also *infra* notes 57–62 and accompanying text.

<sup>28</sup> See *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1290–91 (11th Cir. 2004); BORN, *supra* note 7, at 581 (distinguishing between form requirements that relate to the validity of the arbitration agreement and those that are jurisdictional in nature); *infra* notes 82–104 and accompanying text. Jurisdiction is clearly vested in federal district courts for disputes arising under the New York Convention pursuant to section 203 of the FAA, but in many cases the issue to be determined with respect to form requirements is whether the disputes in these cases are indeed “[a]n action or proceeding falling under the Convention.” 9 U.S.C. § 203.

<sup>29</sup> Non-signatory concerns do arise in the following discussion, but only in a tangential manner. Notably, U.S. courts have developed a wide variety of means of allowing non-signatories to participate in an arbitration. See *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2d Cir. 2003); *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995); BORN, *supra* note 7, at 1137–38. A number of these theories have been considered in international disputes as well. See *Invista S.A.R.L. v. Rhodia, S.A.*, 625 F.3d 75, 85 (3d Cir. 2010); *InterGen N.V. v. Grina*, 344 F.3d 134, 145–50 (1st Cir. 2003). Although every state is different, comparative research demonstrates that most states have adopted some means of binding non-signatories to arbitration. See BORN, *supra* note 7, at 1142–1205. Normally it is the signatory who attempts to bring a non-signatory into an arbitral proceeding, but there are instances where the non-signatory wishes to rely on an arbitration agreement. See *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1899–1900, 1902–03 (2009); Sourcing

Furthermore, the cases that will be introduced are for illustrative purposes only and do not purport to reflect a comprehensive presentation of the nuances in this area of law. Instead, it is sufficient for purposes of this Article to demonstrate the existence and basic scope of the relevant problems, since certain new developments in the international realm not only suggest a potential solution to the difficulties faced by U.S. courts but may in fact require an altogether new approach to form requirements in disputes arising under the New York Convention.<sup>30</sup>

Finally, the following discussion will not consider issues relating to choice of law, even though there is considerable confusion in the United States concerning the proper role of state law versus federal law in matters arising under the New York Convention.<sup>31</sup> However, domestic choice of law concerns may be mitigated in this particular inquiry by the recognition that article II(2):

deals exclusively with what has been termed as the *formal* validity of the agreement to arbitrate. In particular, it does not deal with other, perhaps more substantive, requirements. Under [article] V(1) of the Convention, these *substantive* requirements may be appreciated in the light of domestic law. In other words:

(a) *formal validity* of the agreement to arbitrate should be judged by applying the *uniform rule* of [article] II(2) of the New York Convention (unless domestic law is more liberal); and

(b) *substantive validity* of the agreement to arbitrate may, under [article] V(1) of the Convention, be determined in accordance with national law.<sup>32</sup>

Furthermore, changes on the international front may make debates about

---

Unlimited Inc. v. Asimco Int'l, Inc., 526 F.3d 38, 44 (1st Cir. 2008); Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 97 (2d Cir. 1999). While these principles touch upon issues relating to formal validity of arbitration agreements, there is no need to discuss the underlying concepts in more detail than has been provided here.

<sup>30</sup> See *infra* notes 245–323 and accompanying text.

<sup>31</sup> Several issues affect this analysis. For example, the law governing the formation of an arbitration agreement is arguably different than the law governing the validity of that agreement, at least in the United States. See BORN, *supra* note 7, at 561 (noting that although most countries “apply the same law to the interpretation of an arbitration agreement as to its formation and substantive validity,” the United States is the exception to the general rule). Thus, “some U.S. courts have held that federal common law rules apply to issues of interpretation, but not necessarily questions of formation and validity.” *Id.* at 561, 1084–87. However, it is not always clear whether and to what extent courts distinguish between those two issues. See I.K. Bery, Inc. v. Irving R. Boody & Co., No. 99 CIV 10968 SAS, 2000 WL 218398, at \*2 (S.D.N.Y. Feb. 23, 2000) (citing *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)) (concluding that state law controls the issue of whether an arbitration agreement is enforceable); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1235–36 (S.D.N.Y. 1992) (concluding that the question was governed by federal law, including the New York Convention and its implementing legislation, though noting that support existed to suggest that state law should control the issue).

<sup>32</sup> Alvarez, *supra* note 7, at 72; see also New York Convention, *supra* note 1, art. II(2); Schramm et al., *supra* note 7, at 73, 88. Furthermore, choice of law debates can suggest—improperly—that the proper task is to consider whether a contract has been concluded, when many disputes simply require consideration of whether there has been “an exchange of letters or telegrams” for purposes of establishing an agreement in writing under the Convention. See New York Convention, *supra* note 1, art. II(2); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1238–39 (S.D.N.Y. 1992) (noting narrowness of the analysis).



state versus federal law somewhat moot, at least with respect to the limited issues under discussion in this Article.<sup>33</sup> Therefore, this analysis will focus exclusively on the interplay between form requirements under the New York Convention and the FAA.<sup>34</sup>

### A. Statutory Analysis

As always, analysis begins with consideration of the relevant statutory authorities. In this case, two different enactments must be reviewed: the New York Convention and the FAA.<sup>35</sup>

Before beginning the textual analysis, it is necessary to resolve one preliminary question about the scope of the New York Convention. In the past, parties have occasionally argued that the New York Convention does not apply to disputes involving arbitrations seated within the United States.<sup>36</sup> However, that position is patently contradicted by the plain language of the Convention itself, which states that the Convention applies both to “arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought” (i.e., arbitrations seated outside the United States) and “arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought” (i.e., arbitrations seated in the United States but nevertheless considered to fall under the Convention as a matter of U.S. law).<sup>37</sup>

The types of disputes that are considered “non-domestic” as a matter of U.S. law are described in section 202 of the FAA.<sup>38</sup> That provision indicates that a U.S.-seated proceeding will still fall under the New York Convention if it involves a non-U.S. party or has “some other reasonable relationship with one or more foreign states.”<sup>39</sup> Therefore the New York Convention, including the form requirements outlined in article II, can apply even to arbitrations seated in the United States, so long as there is a sufficient factual basis supporting application of the Convention.<sup>40</sup>

---

<sup>33</sup> New developments in international law and practice might create a new, unified standard that would eliminate debates about differences in U.S. state and federal law, at least with respect to the matters at issue in this Article. See *infra* notes 245–323 and accompanying text.

<sup>34</sup> See New York Convention, *supra* note 1, art. II(2); Federal Arbitration Act, 9 U.S.C. §§ 2, 202 (2011).

<sup>35</sup> See New York Convention, *supra* note 1, art. II(2); 9 U.S.C. §§ 2, 202.

<sup>36</sup> See *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 285–86 (3d Cir. 2003).

<sup>37</sup> New York Convention, *supra* note 1, art. I(1).

<sup>38</sup> See 9 U.S.C. § 202.

<sup>39</sup> *Id.* (stating the New York Convention applies to all arbitrations, wherever located, with the exception of proceedings “entirely between citizens of the United States” that do not “involve[] property located abroad, envisage[] performance or enforcement abroad, or [have] some other reasonable relationship with one or more foreign states”).

<sup>40</sup> See *China Minmetals*, 334 F.3d at 285–86. This is not to say that some courts have not differentiated between U.S.- and foreign-seated arbitrations in other contexts. The primary debate involves the question of whether a motion to vacate an arbitral award that is subject to the New York Convention must be decided under international standards or domestic standards. See New York Convention, *supra* note 1, art. V; 9 U.S.C. § 10. Some courts take the view that the New York Convention does not impose any limits on the grounds upon which vacatur is allowed. See *Yusuf Ahmed Alghanim & Sons W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15, 22–23 (2d Cir. 1997). Other

Analysis begins with the New York Convention. The operative language appears in article II, starting with subsection (1), which states that:

[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to subject to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.<sup>41</sup>

However, it is subsection (2) of article II that is the cause of all the difficulties. That provision states that “[t]he term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”<sup>42</sup> As shall be discussed below, the first problem experienced by U.S. courts involves the consistent interpretation of the language of article II(2).<sup>43</sup>

The second problem that arises in the United States is whether article II(2)’s definition of an “agreement in writing” is applicable in situations where the parties seek to compel arbitration as well as in actions to enforce an arbitral award. Fortunately, that issue can be put to rest relatively easily.

On the one hand, article II(2) is clearly relevant “at the outset of the dispute between the parties, where one of them is seeking to enforce the agreement to arbitrate pursuant to [article] II of the New York Convention.”<sup>44</sup> Indeed, the proximity of the definition of the “agreement in writing” to the twin mandates that “[e]ach Contracting State shall recognize an agreement in writing” (which appears in article II(1)) and that “[t]he court of a Contracting State, when seized of an action in respect of which the parties have made an agreement within the meaning of this article, shall . . . refer the parties to arbitration” (which appears in article II(3)) can leave no doubt as to that conclusion.<sup>45</sup>

On the other hand, article II(2) is not as clearly applicable to motions to enforce an arbitration award.<sup>46</sup> Certainly courts are recognized as exerting “control over the form of the arbitration agreement . . . at the time of the enforcement of the ensuing arbitral award, under the provisions of [article] V of the Convention.”<sup>47</sup> However, applying article II(2) to these actions requires a slightly more circuitous approach to the text.<sup>48</sup> This is because article V of the New York Convention does not include any specific references to “an agreement in writing,” although it does

---

courts take the view that parties may only rely on the grounds relating to non-enforcement under article V of the New York Convention, even in actions to vacate an award arising out of an international commercial arbitration seated in the United States, because such awards are considered non-domestic under article I(1) of the Convention. See New York Convention, *supra* note 1, arts. I, V; *Indus. Risk Insurers v. MAN Guetehoffnungshütte GmbH*, 141 F.3d 1434, 1140–41, 1445 (11th Cir. 1998); *Lander Co. v. MMP Inv., Inc.*, 107 F.3d 476, 481–82 (7th Cir. 1997).

<sup>41</sup> New York Convention, *supra* note 1, art. I(1).

<sup>42</sup> *Id.*

<sup>43</sup> See *infra* notes 69–118 and accompanying text.

<sup>44</sup> Alvarez, *supra* note 7, at 68.

<sup>45</sup> New York Convention, *supra* note 1, arts. II(1), II(3).

<sup>46</sup> See *id.* art. II(2).

<sup>47</sup> Alvarez, *supra* note 7, at 68.

<sup>48</sup> See New York Convention, *supra* note 1, art. II(2).

make one reference to “the agreement referred to in article II” in one of its seven subsections.<sup>49</sup>

There is another alternative, however. Any action to enforce an arbitral award under article V of the New York Convention must comply with the procedural requirements of article IV(1).<sup>50</sup> That latter provision states that:

[t]o obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.<sup>51</sup>

Numerous courts and commentators have held that enforcement proceedings require parties to meet the requirements of article IV(1), which incorporates by reference the standards for an “agreement in writing” reflected in article II(2).<sup>52</sup> Therefore, article II(2) of the New York Convention applies to both motions to compel arbitration and motions to enforce an arbitral award.<sup>53</sup>

The third and final problem that arises with respect to article II(2) involves the interplay between the New York Convention and the FAA.<sup>54</sup> The difficulty here is that the form requirement contained in the FAA does not track form requirements found in the New York Convention.<sup>55</sup> This outcome is unsurprising, given that section 2 of the FAA “has the dubious distinction of being the only still extant legislative provision in a major trading state that is older than the New York Convention’s writing requirement.”<sup>56</sup> However, understanding the historical explanation for the textual discrepancies does not alleviate the problems experienced by U.S. courts.

The problem is exacerbated by the FAA’s statutory structure, which is somewhat convoluted. First, the New York Convention is given domestic

---

<sup>49</sup> *Id.* art. V(1)(a) (stating “[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”).

<sup>50</sup> *See id.* arts. IV–V.

<sup>51</sup> *Id.* art. IV(1).

<sup>52</sup> *Id.* arts. II(2), IV(1); *see also* *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1291 (11th Cir. 2004); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 287 (3d Cir. 2003); *Guang Dong Light Headgear Factory Co. v. ACI Int’l, Inc.*, No. 03-4165-JAR, 2005 WL 1118103, at \*4 (D. Kan. May 10, 2005) (noting contrary reading would make article IV “superfluous”); *Alvarez*, *supra* note 7, at 68–70; *Otto*, *supra* note 7, at 159.

<sup>53</sup> *See* New York Convention, *supra* note 1, art. II(2).

<sup>54</sup> *See id.*; Federal Arbitration Act, 9 U.S.C. §§ 2, 202 (2011).

<sup>55</sup> *See* New York Convention, *supra* note 1, art. II(2); 9 U.S.C. §§ 2, 202.

<sup>56</sup> BORN, *supra* note 7, at 607 (referring to section 2 of the FAA, which appears in Chapter 1 and was enacted in 1925 as part of the original federal statute on arbitration); *see* New York Convention, *supra* note 1, art. II(2); 9 U.S.C. §§ 2, 202.

application within the United States through section 201 of the FAA, which makes article II(2) directly effective in U.S. judicial proceedings.<sup>57</sup> However, the analysis does not stop there.

Section 202 of the FAA states that "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the [New York] Convention."<sup>58</sup> This reference to section 2 invokes text and case law that are more commonly used for purely domestic disputes under Chapter 1 of the FAA.<sup>59</sup> This creates considerable opportunity for confusion, which is made even worse by section 208 of the FAA, which states that "Chapter 1 applies to actions and proceedings brought under [Chapter 2] to the extent that chapter is not in conflict with" Chapter 2 or the New York Convention.<sup>60</sup>

If the structural complexities were not enough, additional problems can arise as a result of the language of section 2 itself.<sup>61</sup> That provision states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>62</sup>

Obviously, the form requirements reflected in section 2 do not mirror those in article II(2).<sup>63</sup> While the FAA only needs evidence of a "written provision" or

<sup>57</sup> See New York Convention, *supra* note 1; 9 U.S.C. § 201 (stating the New York Convention "shall be enforced in United States courts in accordance with" Chapter 2 of the FAA).

<sup>58</sup> 9 U.S.C. § 202. Section 202 does not stop there and with good reason, since Chapter 2 would then encompass the entirety of disputes arising under Chapter 1. Instead, section 202 goes on to limit the types of disputes to which Chapter 2 applies, stating that "[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention." *Id.* This obviously returns a subset of disputes to the exclusive jurisdiction of Chapter 1. However, section 202 has one more clause, this one bringing some disputes that arise out of a relationship entirely between citizens of the United States back within the fold of the New York Convention. This will only occur if:

that relationship [i.e., a relationship entirely between citizens of the United States] involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

*Id.* Thus, the end result is that Chapter 2 of the FAA applies to: (1) agreements or awards arising between a U.S. and foreign party; (2) agreements or awards arising entirely between foreign parties; and (3) agreements or awards arising entirely between U.S. citizens, but only if there is a sufficient international nexus. See *id.*

<sup>59</sup> See 9 U.S.C. §§ 2, 202.

<sup>60</sup> *Id.* § 208.

<sup>61</sup> *Id.* § 2.

<sup>62</sup> *Id.*

<sup>63</sup> See New York Convention, *supra* note 1, art. II(2); 9 U.S.C. § 2.

“an agreement in writing,” the New York Convention further defines its “agreement in writing” as “includ[ing] an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”<sup>64</sup>

Having set forth the relevant statutory regime, it is time to turn to case law to see how U.S. federal courts construe these provisions. In particular, it is useful to see how judges interpret article II(2) on its own and how they handle the apparent conflicts between the New York Convention and the FAA.<sup>65</sup>

## B. U.S. Case Law

U.S. federal courts have addressed a wide variety of matters involving the form requirement of the New York Convention.<sup>66</sup> Although it is possible to group the cases by reference to their underlying fact patterns, as some commentators have done,<sup>67</sup> this Article will approach the issue in slightly different manner, focusing on the sources of authority relied upon by the court rather than the factual context in which the disputes arise. Three categories of cases emerge: (1) those that construe article II(2) of the New York Convention without regard to the FAA; (2) those that construe the FAA without regard to article II(2) of the New York Convention; and (3) those that attempt to harmonize the requirements set forth in both the FAA and the New York Convention.<sup>68</sup> Each line of cases is discussed below in turn.

### 1. Cases Analyzed Under Article II(2) of the New York Convention

The first category of cases to discuss involves decisions that consider form requirements exclusively under article II(2) of the New York Convention.<sup>69</sup> That provision states that “[t]he term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”<sup>70</sup> Since courts often differentiate between an “arbitral clause in a contract,” “an arbitration agreement,” and “an exchange of letters or telegrams” and structure their analysis accordingly, this discussion will do the same.<sup>71</sup>

---

<sup>64</sup> New York Convention, *supra* note 1, art. II(2); 9 U.S.C. § 2.

<sup>65</sup> See New York Convention, *supra* note 1, art. II(2); 9 U.S.C. § 2.

<sup>66</sup> See New York Convention, *supra* note 1, art. II(2).

<sup>67</sup> See BORN, *supra* note 7, at 589–99.

<sup>68</sup> See New York Convention, *supra* note 1, art. II(2); 9 U.S.C. §§ 2, 202.

<sup>69</sup> See New York Convention, *supra* note 1, art. II(2). Even those cases that are analyzed exclusively under article II(2) of the New York Convention may make passing references to the FAA at times, but the analysis focuses on the terms of article II(2). See *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir. 1994) (noting the motion to dismiss for lack of jurisdiction was made under section 203 of the FAA).

<sup>70</sup> New York Convention, *supra* note 1, art. II(2).

<sup>71</sup> See *id.*

a. Arbitral clauses or agreements

U.S. courts have construed the language relating to arbitral clauses or agreements in several different ways. Indeed, the split of authority regarding this issue has become so marked that it was brought to the attention of the U.S. Supreme Court in a 2008 petition for certiorari.<sup>72</sup>

Several different questions exist. The first involves whether and to what extent the parties must have signed the document(s) at issue. One method of analysis is exemplified by the Fifth Circuit decision in *Sphere Drake Insurance PLC v. Marine Towing, Inc.*<sup>73</sup> That case involved an arbitration provision that was found in a larger contract that was not signed by the party objecting to arbitration.<sup>74</sup> In a very sparsely analyzed opinion, the Fifth Circuit held that:

[w]e would outline the Convention definition of "agreement in writing" to include either

- (1) an arbitral clause in a contract or
- (2) an arbitration agreement,
  - (a) signed by the parties or
  - (b) contained in an exchange of letters or telegrams.<sup>75</sup>

Because what was an issue was "an arbitral clause in a contract," rather than a stand-alone arbitration agreement, "the qualifications applicable to arbitration agreements," i.e., the need for signatures from the parties, was considered not to apply.<sup>76</sup>

Other courts have taken a different view of the signature requirement. Indeed, the very next year, the Second Circuit addressed the same issue in *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*<sup>77</sup> Although the Second Circuit considered the Fifth Circuit's opinion in *Sphere Drake*,<sup>78</sup> since that was the only other appellate decision then available, the Second Circuit analyzed the various issues in much more depth and ultimately propounded a very different rule of interpretation.<sup>79</sup>

Rather than reading the signature requirement to relate only to the term

---

<sup>72</sup> See Petition for Writ of Certiorari, *Nielson v. Seaboard Corp.*, No. 08-65, 2008 WL 2773349, at \*i (U.S. July 14, 2008) (stating the question presented was "the proper scope and application of article II(2) of the Convention, relating to when an arbitration clause must be 'signed by the parties or contained in an exchange of letters or telegrams'").

<sup>73</sup> 16 F.3d 666 (5th Cir. 1994).

<sup>74</sup> *Id.* at 669.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 186 F.3d 210 (2d Cir. 1999), partially abrogated on other grounds by *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir. 2005). The Third Circuit later adopted the rationale enunciated in *Kahn Lucas*. See *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003); *Kahn Lucas*, 186 F.3d at 210.

<sup>78</sup> *Sphere Drake*, 16 F.3d at 666.

<sup>79</sup> *Kahn Lucas*, 186 F.3d at 214.

“arbitration agreement,” the Second Circuit held that “the modifying phrase ‘signed by the parties or contained in an exchange of letters or telegrams’ applies to both ‘an arbitral clause in a contract’ and ‘an arbitration agreement.’”<sup>80</sup> In its analysis, the court relied heavily on the grammatical structure of article II(2), although the discussion also referred to the legislative history and texts of the other working-language versions of the New York Convention.<sup>81</sup> Ultimately the Second Circuit came to precisely the opposite conclusion as the Fifth Circuit, holding that the fact that the arbitration clauses in question were contained in purchase orders that were only signed by one party meant that the jurisdictional requirements of article II(2) were not met and the court could not exercise subject matter jurisdiction over the dispute under section 203 of the FAA.<sup>82</sup> As a result, the motion to compel arbitration was dismissed for lack of subject matter jurisdiction.<sup>83</sup>

Although *Kahn Lucas* remains good precedent in the Second Circuit regarding the signature requirement, its analysis of the effect of a negative determination on the court’s jurisdiction was subsequently questioned in *Sarhank Group v. Oracle Corp.*<sup>84</sup> This case involved the claim that “the district court lacked subject matter jurisdiction in the absence of a signed written arbitration agreement between Sarhank and [the objecting party], and because the district court failed to determine independently whether [the objecting party] had consented to arbitration.”<sup>85</sup>

In dismissing these objections, the Second Circuit took the view that this “argument depends entirely upon [the objecting party’s] view of the merits of the case, and therefore does not involve a lack of subject matter jurisdiction.”<sup>86</sup> In the court’s mind:

When a party challenges the court’s subject matter jurisdiction based upon the merits of the case, that party is merely arguing that the adversary has failed to state a claim. Where, as here, the Petition seeks relief under the Constitution or the laws of the United States, the federal courts have subject matter jurisdiction under 28 U.S.C. § 1331, unless the federal claim is immaterial, frivolous and insubstantial or made solely for the purpose of

---

<sup>80</sup> *Id.* at 218; *Sphere Drake*, 16 F.3d at 666. The decision distinguished between the term “arbitral clause in a contract” and “arbitration agreement,” stating that the latter “refers to any agreement to arbitrate which is not a clause in a larger agreement, whether that agreement is part of a larger contractual relationship or is an entirely distinct agreement which relates to a non-contractual dispute.” *Kahn Lucas*, 186 F.3d at 217. Notably, “an agreement in writing” may exist even though the arbitration provisions in question are found in a contractual document that is subject to certain conditions precedent before becoming effective. See *Coutinho Caro & Co., U.S.A. v. Marcus Trading, Inc.*, No. 3:95CV2362, 2000 WL 435566, at \*11 (D. Conn. Mar. 14, 2000).

<sup>81</sup> See New York Convention, *supra* note 1, art. II(2); *Kahn Lucas*, 186 F.3d at 217.

<sup>82</sup> See New York Convention, *supra* note 1, art. II(2); Federal Arbitration Act, 9 U.S.C. §203 (2011); *Kahn Lucas*, 186 F.3d at 218.

<sup>83</sup> See *Kahn Lucas*, 186 F.3d at 219.

<sup>84</sup> 404 F.3d 657, 660 n.2 (2d Cir. 2005). *Sarhank* bears certain similarities with a line of cases discussed below in Subpart II.B.2, in that it considers certain issues arising under the FAA, albeit primarily in passing. See 9 U.S.C. § 203; see also *infra* notes 120–59 and accompanying text. However, it will be discussed here for ease of analysis.

<sup>85</sup> *Sarhank*, 404 F.3d at 660.

<sup>86</sup> *Id.* (noting that “cases confusing these issues are frequently found in the reports”).

obtaining jurisdiction.<sup>87</sup>

Because the party seeking the court's assistance "claimed jurisdiction under the Convention; described a written agreement between Systems and Sarhank; in effect, alleged that a legal relationship was created between Oracle [the objecting party] and Sarhank because Systems was a shell corporation; and described an arbitral award," then "Sarhank has, for subject matter jurisdiction purposes, adequately pleaded an arbitral award falling under the Convention."<sup>88</sup> Because the objections to the arbitration agreement "are merits questions, not subject matter jurisdiction questions," the court retained subject matter jurisdiction.<sup>89</sup>

The Second Circuit in *Sarhank* therefore distinguished its earlier decision in *Kahn Lucas* on the grounds that *Kahn Lucas* "assumed the dispositive question was one of subject matter jurisdiction without addressing the distinction between determining whether subject matter jurisdiction existed and determining—on the merits—whether the parties had made an agreement to arbitrate."<sup>90</sup> Thus, the decision in *Kahn Lucas* is abrogated, at least in the Second Circuit, "to the extent that *Kahn Lucas* is read as viewing an element of a claim as a jurisdictional requisite, the absence of which deprives the Court of subject matter jurisdiction."<sup>91</sup> While *Sarhank* involved a more complex fact pattern than either *Kahn Lucas* or *Sphere Drake*, in that the objection to enforcement was raised by a non-signatory to the arbitration agreement, the new approach to the jurisdictional issue is intriguing and obviously acts to expand the types of disputes over which the federal court can assert its power.<sup>92</sup>

Although *Kahn Lucas* and *Sphere Drake* clearly reflect two different lines of analysis with regard to the signature requirement, there is another decision in this line of cases that must be considered.<sup>93</sup> This opinion, *Czarina, L.L.C. v. W.F. Poe Syndicate*, is also decided exclusively under article II(2) of the New York Convention.<sup>94</sup>

The decision comes out of the Eleventh Circuit and is interesting for several reasons. First, although *Czarina* made explicit references to both *Sphere Drake* and *Kahn Lucas*, it avoided any attempt to decide between the two interpretations of the signature requirement.<sup>95</sup> Second, *Czarina* clearly

---

<sup>87</sup> *Id.* (citations omitted).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 660 n.2.

<sup>91</sup> *Id.* It is unclear what effect, if any, *Sarhank* has in the Third Circuit, which adopted the rationale enunciated in *Kahn Lucas* prior to the decision in *Sarhank*. See *id.*; *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003); *Kahn Lucas Lancaster, Inc. v. Lark Int'l Inc.*, 186 F.3d 210 (2d Cir. 1999), partially abrogated on other grounds by *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir. 2005).

<sup>92</sup> *Sarhank*, 404 F.3d at 660 n.2; *Kahn Lucas*, 186 F.3d at 210; *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994).

<sup>93</sup> See New York Convention, *supra* note 1, art. II(2); *Kahn Lucas*, 186 F.3d at 210; *Sphere Drake*, 16 F.3d at 666.

<sup>94</sup> See New York Convention, *supra* note 1, art. II(2); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004).

<sup>95</sup> See *Czarina*, 358 F.3d at 1291; *Kahn Lucas*, 186 F.3d at 210; *Sphere Drake*, 16 F.3d at 666.



demonstrates that the agreement-in-writing requirement found in article II(2) applies to both motions to compel an arbitration and motions to enforce an arbitral award (*Sphere Drake* and *Kahn Lucas* both involved motions to compel).<sup>96</sup> This second point affects the third, and most interesting, aspect of *Czarina*.<sup>97</sup>

Third, the Eleventh Circuit took the view that:

[t]he failure of a party to satisfy article IV's requirements qualifies as one of the "grounds for refusal or deferral . . . specified in the said Convention" . . . . Thus, we hold that the party seeking confirmation of an award falling under the Convention must meet article IV's prerequisites to establish the district court's subject matter jurisdiction to confirm the award.<sup>98</sup>

Because the "agreement in writing" requirement was reflected in article IV, the party had to meet the standard of article II.<sup>99</sup> As a result of various precedents, including *Kahn Lucas*, the court held that "[w]here a party has failed to satisfy the agreement-in-writing prerequisite, courts have dismissed the action for lack of jurisdiction."<sup>100</sup>

That is precisely the result that obtained in this case, since the party seeking to enforce the arbitral award was unable to overcome the jurisdictional problems associated with the writing requirement.<sup>101</sup> This is true even though the dispute had proceeded to a final determination on the merits, with the Eleventh Circuit dismissing arguments that (1) the question of arbitrability had been conclusively decided by the arbitral tribunal and (2) the objecting party had waived its jurisdictional arguments by participating in the arbitration on the merits.<sup>102</sup>

The situation in *Czarina* may have been influenced by the fact that there did not appear to be an arbitration agreement in writing between the original parties to the transaction, which meant that *Czarina*—the non-signatory attempting to enforce the arbitral award—had nothing upon which to establish its jurisdictional foundation.<sup>103</sup> However, the Eleventh Circuit still dismissed for a lack of subject matter jurisdiction, which is different than a dismissal for failure to state a claim, which would appear to be the approach preferred by the Second Circuit in

---

<sup>96</sup> *Czarina*, 358 F.3d at 1291 (noting that motions to enforce an award must comply with article IV of the Convention, which refers specifically to article II); see also *Kahn Lucas*, 186 F.3d at 210; *Sphere Drake*, 16 F.3d at 666. *Sarhank* also involved a motion to enforce an arbitral award, but *Czarina* predates *Sarhank* and is decided exclusively under the New York Convention. See New York Convention, *supra* note 1, art. II(2); *Sarhank*, 404 F.3d at 659; *Czarina*, 358 F.3d at 1286.

<sup>97</sup> See *Czarina*, 358 F.3d at 1286.

<sup>98</sup> *Id.* at 1292.

<sup>99</sup> See New York Convention, *supra* note 1, arts. II(2), IV; *Czarina*, 358 F.3d at 1291.

<sup>100</sup> *Czarina*, 358 F.3d at 1291; *Kahn Lucas*, 186 F.3d at 218. Notably, the decision was handed down prior to *Sarhank*. See *Sarhank*, 404 F.3d at 660 n.2.

<sup>101</sup> See *Czarina*, 358 F.3d at 1294.

<sup>102</sup> See *id.* at 1293–94 (noting the ultimate question of arbitrability is one for the courts and that the respondent had objected to the arbitral tribunal throughout the proceedings). Cf. CTA Lind & Co Scandinavia AB v. Lind, No. 8:08-cv-1380-T30TGW, 2009 WL 961156, at \*2–3 (M.D. Fla. Apr. 7, 2007) (noting respondent had failed to object to arbitration in timely manner).

<sup>103</sup> See *Czarina*, 358 F.3d at 1289.

*Sarhank*.<sup>104</sup>

b. Exchange of letters or telegrams

U.S. cases have also considered language in the New York Convention concerning the "exchange of letters or telegrams" as proof of an article II "agreement in writing."<sup>105</sup> Some questions have arisen as to whether electronic mails, facsimiles or the like constitute "letters or telegrams," but those matters are not conceptually difficult, with most federal courts taking a relatively permissive attitude towards technological innovations.<sup>106</sup>

Instead, the more interesting debate is whether a particular series of documents can constitute an "exchange of letters or telegrams."<sup>107</sup> Although there is not as clear a circuit split under this aspect of article II(2) as exists with respect to the signature requirement, there are nevertheless several issues that can create problems for parties.<sup>108</sup>

For example, U.S. courts have stated that the documents that are exchanged under this provision must be sufficiently clear to draw the arbitration provision to the attention of the parties. Thus, *Bothell v. Hitachi Zosen Corp.* stated that:

where the words used to refer to a proposed arbitration agreement are so vague as to be meaningless and no further explanation is provided, either by attachment, discussion or otherwise, the totality of the documents exchanged between the parties does not constitute a valid "arbitration agreement" under the Convention.<sup>109</sup>

Although this particular holding appears to be undisputed, the standard identified by the court is extremely fact-dependant. As such, parties may find themselves in litigation to determine whether the documents that were exchanged were sufficiently precise as to give rise to an enforceable arbitration agreement. This, of course, does not foster the predictability that is so important to international commerce.<sup>110</sup>

*Standard Bent Glass Corp. v. Glassrobots Oy* also addressed the issue of whether the documents that were exchanged demonstrated sufficient clarity so as to put the other party on notice that arbitration had been proposed.<sup>111</sup> In that case, the

<sup>104</sup> See *id.*; *Sarhank*, 404 F.3d at 660.

<sup>105</sup> See New York Convention, *supra* note 1, art. II(2).

<sup>106</sup> See UNCITRAL Note, *supra* note 12, ¶ 22; see also *Ahcom, Inc. v. Smeding*, No. C-07-1139 SC, 2008 WL 1701731, at \*2 (N.D. Cal. Apr. 10, 2008); *Chloe Z. Fishing Co. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 1250 (S.D. Cal. 2000); *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F. Supp. 879, 882–83 (S.D.N.Y. 1991).

<sup>107</sup> See New York Convention, *supra* note 1, art. II(2).

<sup>108</sup> See *id.*; see also *supra* notes 75–107 and accompanying text.

<sup>109</sup> 97 F. Supp. 2d 1048, 1053 (W.D. Wash. 2000); see also *Polychronakis v. Celebrity Cruises, Inc.*, No. 08-21806-CV, 2008 WL 5191104, at \*4 (S.D. Fla. Dec. 10, 2008).

<sup>110</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985); see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538 (1995); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974).

<sup>111</sup> 333 F.3d 440, 449–50 (3d Cir. 2003) (noting also there was no need for a signature if the agreement in writing was reflected in an exchange of letters); see also *Bothell*, 97 F. Supp. 2d at 1053

Third Circuit determined that the appropriate standard was whether the provision referenced in the exchanged document caused surprise or hardship.<sup>112</sup> Since the reference to arbitration in the exchanged documents was clear, the requirements of article II(2) were therefore met.<sup>113</sup>

Interestingly, *Standard Bent Glass* also imports the *Sphere Drake* and *Kahn Lucas* debate about signatures into the context of “an exchange of letters or telegrams.”<sup>114</sup> The Third Circuit decided to adopt the reasoning of the Second Circuit in *Kahn Lucas*, on the grounds that article II(2):

includes a comma after “arbitration agreement,” demonstrating an intent to apply the signature and exchange of letters requirements to both an arbitral clause within a contract or a separate arbitration agreement. . . . Thus, the plain language provides that an arbitration clause is enforceable only if it was contained in a signed writing or an exchange of letters.<sup>115</sup>

One last issue that can arise in debates about the “exchange of letters or telegrams” is whether the documents containing the purported language regarding arbitration were actually exchanged.<sup>116</sup> Although courts have indicated that agreement can be found either explicitly or implicitly, there still needs to be “a definite and seasonable expression of acceptance.”<sup>117</sup> Although this is a pro-arbitration position, it nevertheless requires courts to undertake an expensive, fact-intensive analysis about a jurisdictional issue that may not ultimately be all that necessary, which is potentially problematic.<sup>118</sup>

---

(discussing whether a party should have known that the phrase “General Terms and Conditions” did not apply to the same concepts encompassed by the phrase “Further Terms & Conditions”).

<sup>112</sup> See *Standard Bent Glass*, 333 F.3d at 447–48. This case is somewhat problematic in that the issue of the “exchange of letters or telegrams” under article II(2) is decided by reference to principles found in the Uniform Commercial Code. See *id.* at 444–48.

<sup>113</sup> See New York Convention, *supra* note 1, art. II(2); *Standard Bent Glass*, 333 F.3d at 449–50.

<sup>114</sup> New York Convention, *supra* note 1, art. II(2); *Standard Bent Glass*, 333 F.3d at 449; *Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999), *partially abrogated on other grounds by* *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir. 2005); *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir. 1994).

<sup>115</sup> *Standard Bent Glass*, 333 F.3d at 449; see also New York Convention, *supra* note 1, art. II(2); *Kahn Lucas*, 186 F.3d at 218.

<sup>116</sup> See New York Convention, *supra* note 1, art. II(2); *Dynamo v. Ovechkin*, 412 F. Supp. 2d 24, 28 (D.D.C. 2006); *Bothell*, 97 F. Supp. 2d at 1053.

<sup>117</sup> *Dynamo*, 412 F. Supp. 2d at 29 (citation omitted). Courts in other countries have taken the view that exchange of documents referring to an arbitration provision are sufficient to meet the requirements of article II(2), even if the exchanged documents do not include the arbitration provision itself. See New York Convention, *supra* note 1, art. II(2); di Pietro, *supra* note 7, at 445. Of course, an exchange of letters in which one party explicitly disavows the contents of a previous communication containing an arbitration provision cannot be held to meet the requirements of article II(2). See New York Convention, *supra* note 1, art. II(2); *Sen Mar Inc. v. Tiger Petroleum Corp.*, 774 F. Supp. 879, 882–83 (S.D.N.Y. 1991).

<sup>118</sup> BORN, *supra* note 7, at 619 (claiming “existing form requirements in the New York Convention . . . are unnecessary and instead serve to frustrate commercial parties’ legitimate expectations and rights”); see also *infra* notes 245–323 and accompanying text.

## 2. Cases Analyzed Under Section 2 of the FAA

Not all U.S. decisions focus on the precise language of article II(2) of the New York Convention.<sup>119</sup> Instead, some courts have analyzed form requirements in disputes arising under the Convention by reference primarily to the FAA, despite the fact that "any dispute involving international commercial arbitration which meets the [New York] Convention's jurisdictional requirements . . . must be resolved with reference to that instrument."<sup>120</sup>

The FAA's form requirements for actions arising under the New York Convention are found in two places.<sup>121</sup> Section 202 defines the Convention as applying to an arbitration agreement or arbitral award "arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title."<sup>122</sup> Section 2 then gives further detail to the requirements identified in section 202 by stating that these sorts of transactions, contracts, or agreements must be reflected in writing to be enforceable, either as a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction" or as "an agreement in writing to submit to arbitration an existing controversy."<sup>123</sup> These provisions are obviously less demanding than those found in article II(2) of the New York Convention.<sup>124</sup>

Interestingly, a number of cases that analyze form requirements solely under the FAA do not do so because the FAA is more generous towards parties seeking enforcement of an agreement or an award.<sup>125</sup> Instead, decisions like *Progressive Casualty Insurance Co. v. C.A. Reaseguradora Nacional de Venezuela* fail to mention the Convention at all, instead relying on diversity to establish federal jurisdiction and citing domestic provisions of arbitration law regarding the procedural and substantive disputes.<sup>126</sup> Other opinions, including those in *Astor Chocolate Corp. v. Mikroverk Ltd.*,<sup>127</sup> *Genesco, Inc. v. Kakiuchi & Co., Ltd.*,<sup>128</sup> and *Beromun Aktiengesellschaft v. Societa Industriale Agricola "Tress" di Dr. Domenico e Dr. Antonio dal Ferro*<sup>129</sup> mention the New York Convention in passing, but do not consider its provisions with respect to form requirements. Although

---

<sup>119</sup> See New York Convention, *supra* note 1, art. II(2).

<sup>120</sup> *Filanto, S.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1236 (S.D.N.Y. 1992); see also New York Convention, *supra* note 1; Federal Arbitration Act, 9 U.S.C. § 201 (2011).

<sup>121</sup> See 9 U.S.C. §§ 2, 202.

<sup>122</sup> *Id.* § 202.

<sup>123</sup> *Id.* § 2.

<sup>124</sup> See New York Convention, *supra* note 1, art. II(2); BORN, *supra* note 7, at 607.

<sup>125</sup> See 9 U.S.C. § 2.

<sup>126</sup> See 991 F.2d 42, 44 (2d Cir. 1993) (failing to cite the New York Convention despite presence of a foreign party and an arbitration provision calling for arbitration in London). Even though one of the parties was not from a New York Convention state (Venezuela did not join the Convention until 1995), the arbitration was to be seated in a Contracting State, which is the key element in determining the applicability of the New York Convention. See *id.* at 45; see also New York Convention, *supra* note 1, art. I(1). The court did cite several provisions of Chapter 2 of the FAA in passing. See 991 F.2d at 45.

<sup>127</sup> See 704 F. Supp. 30, 33 (E.D.N.Y. 1989) (dealing with series of documents).

<sup>128</sup> See 815 F.2d 840, 844 (2d Cir. 1987) (dealing with series of documents).

<sup>129</sup> See 471 F. Supp. 1163, 1170 (S.D.N.Y. 1979) (dealing with whether a signature was needed on an arbitration agreement).

these cases are all somewhat older, none of them has been explicitly overruled. This of course creates traps for the unwary and the inexperienced.<sup>130</sup>

Furthermore, these kinds of U.S.-centric analyses are not limited to older precedents alone. In 2008, the First Circuit was asked to consider whether a non-signatory could appeal an order denying a motion to compel arbitration in a dispute falling under the New York Convention in *Sourcing Unlimited, Inc. v. Asimco International, Inc.*<sup>131</sup> The court concluded that such an appeal was possible, since “[w]e do not read anything in the language of Chapter 2 to suggest that a party seeking an appeal from an order denying international arbitration must have signed a written arbitration agreement firsthand.”<sup>132</sup>

The important part of this decision is whether and to what extent the court took the requirements of the New York Convention into account.<sup>133</sup> As it turns out, that analysis was extremely cursory, with the court stating:

The Convention does require some writing to render an arbitration agreement enforceable. Article II of the Convention contemplates “an agreement in writing” as a prerequisite to recognizing an arbitration agreement under the treaty. Here, it is undisputed that there is a writing. That is a separate issue, however, from whether 9 U.S.C. § 16(a)(1)(C) allows interlocutory appeals by non-signatories to such a written agreement.<sup>134</sup>

No consideration was given to the reasons behind the New York Convention’s form requirements or how a decision of this nature might affect the international commercial order.<sup>135</sup> This is not to say that the court did not undertake a policy analysis, for it did cite the strong pro-arbitration policy that exists in the United States, particularly in international cases.<sup>136</sup> Nevertheless, the emphasis

<sup>130</sup> See S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT’L ARB. 120, 124 (2009) (noting various problems facing novices in international commercial arbitration).

<sup>131</sup> 526 F.3d 38, 43 (1st Cir. 2008). Another recent case that ignores the terms of the New York Convention in favor of domestic principles of law is *Invista North America S.A.R.L. v. Rhodia Polyamide Intermediates S.A.S.*, 503 F. Supp. 2d 195, 201 (D.D.C. 2007).

<sup>132</sup> *Sourcing Unlimited*, 526 F.3d at 45; see also *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1900 (2009) (indicating the ability to appeal should not be confused with other issues).

<sup>133</sup> See New York Convention, *supra* note 1, art. II(2).

<sup>134</sup> *Sourcing Unlimited*, 526 F.3d at 45 n.7. The party seeking to compel arbitration was not a signatory to the arbitration agreement that qualified as writing under article II(2). See *id.* at 44; see also New York Convention, *supra* note 1, art. II(2).

<sup>135</sup> See New York Convention, *supra* note 1; SG Report, *supra* note 13, ¶ 8 (noting some of the problems that can arise when courts do not take international norms into account when deciding issues regarding form requirements).

<sup>136</sup> The court stated:

[t]o erect a bright-line rule that this court lacks jurisdiction to review appeals taken under s 16(a)(1)(C) from denials of international arbitration unless all parties to the dispute are signatories to a written arbitration agreement would insulate a whole class of denials of motions to compel arbitration from review until after the litigation has run its course. Such a rule would contravene the courts’ obligation to enforce arbitration agreements under the New York Convention and Chapter 2 of the FAA.

*Sourcing Unlimited*, 526 F.3d at 46 (citations omitted).

focused entirely on domestic principles and considerations, which could lead to an outcome that is out of step with practices in other countries.<sup>137</sup>

A somewhat similar analysis was undertaken in *Regent Seven Seas Cruises, Inc. v. Rolls Royce, PLC*.<sup>138</sup> In that case, the court held that “once it has been asserted that a written agreement exists (even if it is not between the parties in the litigation), the jurisdictional element has been satisfied. The presence of a proper written agreement is more properly viewed as an element of the claim rather than a jurisdictional prerequisite.”<sup>139</sup> This is, of course, similar to the analysis undertaken in *Sarhank*, which was explicitly relied upon by the court in *Regent Seven Seas*.<sup>140</sup>

The underlying facts were central to this analysis. Essentially:

Although Regent vigorously denies that the arbitration clause is applicable to it in this case, it does not deny that it is a valid arbitration agreement. By alleging that the written arbitration agreement applies to Regent, the Petitioners have met the jurisdictional requirement of § 202. That is, for the Court to entertain Regent’s argument that the written agreement is insufficient to compel arbitration, the Court must necessarily assume jurisdiction over the case.<sup>141</sup>

One interesting outcome of cases like *Regent Seven Seas*, *Sourcing Unlimited*, and *Sarhank* (which, though discussed above in connection with *Kahn Lucas*, falls more neatly into the current discussion, since the Second Circuit relied primarily on the FAA rather than the New York Convention) is that they all decrease the focus on the writing requirement as a jurisdictional matter.<sup>142</sup> In many ways, this approach is consistent with developments in other jurisdictions where “the decisive issue is simply whether the parties agreed to arbitrate . . . with the writing requirement being reformulated as an evidentiary principle, rather than a rule of formal validity.”<sup>143</sup> This issue is considered further below.<sup>144</sup>

<sup>137</sup> See SG Report, *supra* note 13, ¶ 8; Landau, *supra* note 7, at 51.

<sup>138</sup> See No. 06-22347-CIV, 2007 WL 601992 (S.D. Fla. Feb. 21, 2007). *Regent Seven Seas* bears some similarities to cases that attempt to harmonize article II(2) and the FAA, in that it also recites a four-element test for jurisdiction. *Id.* at \*3; see also *infra* notes 145–59 and accompanying text. However, the bulk of the analysis appears to fall into the realm of domestic U.S. law, which is why the case is included in this section.

<sup>139</sup> *Id.* at \*4 (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 (2d Cir. 2005); *Beiser v. Weyler*, 284 F.3d 665, 670 (5th Cir. 2002)).

<sup>140</sup> See *Sarhank*, 404 F.3d at 660; see also *supra* notes 87–95 and accompanying text.

<sup>141</sup> *Regent Seven Seas*, 2007 WL 601992, at \*4. This posture allowed the court to distinguish contrary holdings in cases where it was not admitted that an arbitration agreement existed. *Id.* (distinguishing *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004)); see also *Borsack v. Chalk & Vermillion Fine Arts, Ltd.*, 974 F. Supp. 293, 301 (S.D.N.Y. 1997) (stating “once a party establishes that, indeed, a signed writing reflecting the agreement to arbitrate exists, the general rules of contract law apply to determine which parties are subject to arbitration”).

<sup>142</sup> See New York Convention, *supra* note 1; *Kahn Lucas*, 186 F.3d 210; *Sourcing Unlimited, Inc. v. Asimco Int’l, Inc.*, 526 F.3d 38 (1st Cir. 2008); *Sarhank*, 404 F.3d at 660; *Regent Seven Seas*, 2007 WL 601992, at \*4.

<sup>143</sup> BORN, *supra* note 7, at 613 (discussing Model Arbitration Law and other national legislation).

<sup>144</sup> See *infra* notes 195–96 and accompanying text.

### 3. Cases Analyzed Under Both Article II(2) of the New York Convention and Section 2 of the FAA

Those considering form requirements in international commercial arbitration are not limited to a stark choice between article II(2) of the New York Convention or section 2 of the FAA.<sup>145</sup> Instead, some U.S. decisions reflect an effort to harmonize the two provisions.<sup>146</sup>

Thus, for example, the Second Circuit stated in *Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith Cogeneration International Inc.* that:

[t]he Convention and the implementing provisions of the FAA set forth four basic requirements for enforcement of arbitration agreements under the Convention: (1) there must be a written agreement; (2) it must provide for arbitration in the territory of a signatory of the convention; (3) the subject matter must be commercial; and (4) it cannot be entirely domestic in scope.<sup>147</sup>

One thing that is not clear from this quote is whether the phrase “written agreement” is being used in the technical sense of the New York Convention or whether it is being used more generally, as would be the case if the term were intended to reflect the requirements of section 2 of the FAA.<sup>148</sup> The distinction was slightly clearer in *Lo v. Aetna International, Inc.*, where the court not only put the phrase “agreement in writing” in quotation marks, thus suggesting the phrase was being used as a term of art, but also discussed the parties’ compliance with the New York Convention’s signature requirement, albeit somewhat cursorily.<sup>149</sup> Notably, this variation in punctuation could either reflect or lead to differences in interpretation, which could cause a circuit split similar to the one involving *Sphere*

<sup>145</sup> See New York Convention, *supra* note 1, art. II(2); Federal Arbitration Act, 9 U.S.C. §§ 2, 202 (2011).

<sup>146</sup> See New York Convention, *supra* note 1, art. II(2); 9 U.S.C. §§ 2, 202.

<sup>147</sup> 198 F.3d 88, 92 (2d Cir. 1999).

<sup>148</sup> See New York Convention, *supra* note 1, art. II(2); 9 U.S.C. § 2; *Smith/Enron*, 198 F.3d at 92. However, the authority cited by the Second Circuit for this proposition suggests that the phrase “written agreement” is used in its New York Convention sense. See New York Convention, *supra* note 1, art. II; *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186 (1st Cir. 1982). Nevertheless, *Ledee* comes from a different circuit, which could support a claim that the interpretation is not precisely the same in the different circuits. Experience shows that courts are partial to grammatical arguments in this area of law. See *id.*; see also *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003); *Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999), *partially abrogated on other grounds by Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir. 2005).

<sup>149</sup> See No. 3:99CV195JBA, 2000 WL 565465, at \*3–4 (D. Conn. Mar. 29, 2000). The court there held:

In order for an action to “relate” to an arbitration under the Convention, four questions must be resolved: (1) whether there is an “agreement in writing” to arbitrate the subject of the dispute; (2) whether the agreement provides for arbitration in the territory of a signatory of the Convention; (3) whether the agreement arises out of a legal relationship, contractual or not, which is considered “commercial”; and (4) whether a party to the agreement is a foreign citizen or the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation to one or more foreign states.

*Id.* at \*3.

*Drake and Kahn Lucas*.<sup>150</sup>

The Eleventh Circuit recently provided some intimation on how the FAA and the New York Convention might be further harmonized in the future. *Bautista v. Star Cruises* focused primarily on issues relating to the exemption of seaman employment contracts from the scope of the FAA.<sup>151</sup> However, the dispute arose in the context of the New York Convention, and in discussing section 202 of the FAA, the court noted that "section 202 does not incorporate section 2 of the FAA as an exhaustive description" of the scope of Chapter 2 of the FAA.<sup>152</sup> "Rather, section 202 uses section 2 as an illustration of the types of agreements covered by" Chapter 2.<sup>153</sup> Interestingly, this observation opens the door for the argument that Chapter 2 covers a wider variety of agreements than are described in Chapter 1 of the FAA.<sup>154</sup>

Another example of the diminishing writing requirement is *Slaney v. International Amateur Athletic Federation*.<sup>155</sup> Here, the Seventh Circuit did not even attempt to address the requirement of an agreement in writing, instead setting that analysis aside in favor of a conduct-based estoppel analysis.<sup>156</sup> Because the respondent had "freely participated" in the underlying arbitration, she was estopped from claiming later that the arbitration was improper.<sup>157</sup>

Although this is a very broad-reaching conclusion, the claim in *Slaney* that an agreement in writing was "irrelevant" has been classified as dicta and the decision subsequently distinguished by the Third Circuit.<sup>158</sup> Indeed, that case involved a strongly worded concurrence from then-Circuit Judge Samuel Alito, who was clearly in favor of retaining a writing requirement under the New York Convention.<sup>159</sup>

### C. Conclusions Regarding the Form Requirement Under U.S. Law

As the preceding discussion shows, U.S. law is highly inconsistent in its treatment of form requirements in cases involving the New York Convention.<sup>160</sup> In fact, the analysis demonstrated several different types of variations existing simultaneously. First, there is a clear and well-known circuit split with respect to the signature requirement under article II(2) of the New York Convention.<sup>161</sup> Although that issue has existed for some time, there is apparently a second potential split brewing with respect to cases that attempt to harmonize the standards reflected

---

<sup>150</sup> See *Kahn Lucas*, 186 F.3d at 218; *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir. 1994); see also *supra* notes 76–98 and accompanying text.

<sup>151</sup> 396 F.3d 1289, 1295 (11th Cir. 2005); see also 9 U.S.C. § 1.

<sup>152</sup> *Bautista*, 396 F.3d at 1297.

<sup>153</sup> *Id.*

<sup>154</sup> See 9 U.S.C. §§ 2, 202.

<sup>155</sup> 244 F.3d 580, 591 (7th Cir. 2001).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 284–85 (3d Cir. 2003).

<sup>159</sup> See *id.* at 292–94 (Alito, C.J., concurring).

<sup>160</sup> See New York Convention, *supra* note 1.

<sup>161</sup> See *supra* notes 76–98 and accompanying text.



in the New York Convention with those found in the FAA.<sup>162</sup>

Second, there is little agreement among U.S. courts about the proper relationship between the form requirements of the New York Convention and those of the FAA.<sup>163</sup> Some opinions focus solely on standards found in the New York Convention, while others emphasize those reflected in the FAA.<sup>164</sup> A third category of cases attempts to blend aspects of both provisions. While each of these approaches obviously has its benefits,<sup>165</sup> the fact that all three are being used simultaneously and in apparent ignorance of the other possible methods of analysis is highly problematic in an area of law that is intended to reflect a high degree of consistency and predictability.

Third, some U.S. courts appear to be placing less emphasis on technical form requirements than was once the case. While this conclusion may simply be the result of the limited number of judicial decisions chosen for discussion, it may also be the case that the types of issues that are currently being contested are more difficult to resolve through a strict textual analysis than those that arose twenty or thirty years ago. Some might think that courts today face more difficult issues because many of the basic questions have now become settled law (although the various circuit splits would suggest that is not the case), but there is evidence to suggest that more complex legal issues are arising because international commercial transactions are themselves becoming more complicated and multifaceted.<sup>166</sup> Indeed, changes in the way multinational actors do business is one of the reasons why highly technical form requirements may no longer be either wise or necessary, since they may in many ways be contrary to international commercial practice.<sup>167</sup>

Having described the manner in which the United States deals with form requirements, it is time to consider issues that arise in other countries so as to establish the extent to which the United States conforms to international norms. That discussion is contained in the following section.

---

<sup>162</sup> See *supra* notes 151–54 and accompanying text.

<sup>163</sup> See New York Convention, *supra* note 1, art. II(2); Federal Arbitration Act, 9 U.S.C. §§ 2, 202 (2011).

<sup>164</sup> See New York Convention, *supra* note 1, art. II(2); 9 U.S.C. §§ 2, 202.

<sup>165</sup> It is beyond the scope of this Article to undertake an in-depth analysis of the propriety of each of the three approaches, although each has jurisprudential merit. For example, the two lines of cases that explicitly invoke the New York Convention are consistent with authorities stating that the terms of the Convention should be considered in light of international standards. See New York Convention, *supra* note 1; see also *infra* notes 176–97 and accompanying text. While decisions that rely solely on domestic law may appear improper, given the need to interpret Convention matters in an international manner, this type of analysis could be justified if it could be shown that U.S. domestic law is more favorable to the party seeking to enforce the arbitration agreement or award than the approach available under the Convention. See New York Convention, *supra* note 1; see also *infra* notes 198–225 and accompanying text. If that is true, then the method of analysis is entirely consistent with the terms of the New York Convention, although the judicial reasoning could be improved by explicit references to article VII(1) of the Convention, which authorizes reliance on domestic law in certain circumstances. See New York Convention, *supra* note 1, art. VII(1); see also *infra* notes 198–225 and accompanying text.

<sup>166</sup> See BORN, *supra* note 7, at 1–2.

<sup>167</sup> See SG Report, *supra* note 13, ¶ 7; BORN, *supra* note 7, at 619 (claiming that “existing form requirements in the New York Convention . . . are unnecessary and instead serve to frustrate commercial parties’ legitimate expectations and rights”).

### III. INTERNATIONAL ISSUES REGARDING THE FORM REQUIREMENT OF THE NEW YORK CONVENTION

It is universally agreed that the New York Convention is meant to have a harmonizing effect on national legislation and judicial pronouncements so as to facilitate international commercial arbitration and thereby promote international trade.<sup>168</sup> Thus, U.S. courts have recognized that:

[i]n pursuing effective, unified arbitration standards, the Convention’s framers understood that the benefits of the treaty would be undermined if domestic courts were to inject their “parochial” values into the regime:

In their discussion of [article II(1)], the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.<sup>169</sup>

Congress is said to have done its part to fulfill the goals of the Convention with respect to article II through enactment of the “broad language of section 202” of the FAA.<sup>170</sup> However, no conclusions can yet be made regarding whether and to what extent U.S. courts have resisted injecting “parochial” values into the application of the Convention.<sup>171</sup> To understand where the United States stands with respect to international standards regarding the interpretation and application of article II(2) of the New York Convention, it is necessary to describe how other jurisdictions treat that particular provision.<sup>172</sup>

This task is greatly facilitated by the fact that UNCITRAL undertook a large-scale, long-term research project seeking input from various states regarding their interpretation of article II(2) of the New York Convention.<sup>173</sup> This ten-year-long study provides very useful insights into how different states interpret and apply the form requirements of the Convention<sup>174</sup> and thus can be used to determine whether a consensus exists regarding international practice in this area of law. To that end, the following discussion describes the primary conclusions reached by

<sup>168</sup> See BORN, *supra* note 7, at 92–95; JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶¶ 2-20, 26-19 to 26-22 (2003); NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* ¶¶ 1.220 to 1.224 (2009).

<sup>169</sup> *Bautista v. Star Cruises*, 396 F.3d 1289, 1300 (11th Cir. 2005) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

<sup>170</sup> See New York Convention, *supra* note 1, art. II(2); Federal Arbitration Act, 9 U.S.C. § 202 (2011); *Bautista*, 396 F.3d at 1300.

<sup>171</sup> See New York Convention, *supra* note 1, art. II(2); *Bautista*, 396 F.3d at 1300.

<sup>172</sup> See New York Convention, *supra* note 1, art. II(2).

<sup>173</sup> See *id.*; UNCITRAL, Working Grp. II (Arbitration), *Compilation of Comments by Governments, Note by the Secretariat*, U.N. Doc. A/CN.9/661 (May 6, 2008) [hereinafter UNCITRAL Compilation Note]; UNCITRAL, Working Grp. II (Arbitration), *Compilation of Comments by Governments, Note by the Secretariat*, U.N. Doc. A/CN.9/661/Add.3 (June 12, 2008) [hereinafter UNCITRAL Addendum Note].

<sup>174</sup> See New York Convention, *supra* note 1; UNCITRAL Note, *supra* note 12, ¶¶ 11–36; SG Report, *supra* note 13, ¶¶ 28–32; Haarmann, *supra* note 7, at 126; Xiao & Long, *supra* note 7, at 570.

UNCITRAL, focusing in particular on national interpretation of article II(2), the interplay between article II(2) and article VII(1), enactment and application of the UNCITRAL Recommendation, and the purpose and effect of the UNCITRAL Model Law on International Commercial Arbitration (Model Arbitration Law).<sup>175</sup>

#### *A. International Interpretation of Article II(2) of the New York Convention*

According to research conducted by UNCITRAL, state courts vary in their application of article II(2) of the New York Convention, although the differences are primarily seen at a state-to-state level rather than within a single jurisdiction, as is the case in the United States.<sup>176</sup> For example, some states “strictly appl[y] the requirements” reflected in article II(2) and enforce arbitral awards “only when either the contract containing the arbitration clause or the arbitration agreement was signed by the parties or was contained in an exchange of letters or telegrams.”<sup>177</sup> The United States falls into this category of countries, although the U.S. is singled out by UNCITRAL as having a particularly inconsistent and divergent national approach to the signature requirement under article II(2).<sup>178</sup> Although UNCITRAL does not explicitly offer an opinion as to which of the two lines of U.S. cases is the correct reading of the New York Convention, certain statements suggest that UNCITRAL takes the view that the signature requirement applies to both arbitration agreements and arbitral clauses in contracts.<sup>179</sup>

For the most part, courts adopting a strict approach to the writing requirement do not allow oral agreements to arbitrate, even if that agreement is subsequently confirmed in writing or through some sort of conduct such as appearance before the arbitrator or performance of the contract.<sup>180</sup> Similarly, states exhibiting a strict approach to issues of form typically do not permit courts to recognize arbitration agreements based on prior trade practices.<sup>181</sup>

<sup>175</sup> See New York Convention, *supra* note 1, arts. II(2), VII(1); UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration, 18th Sess., Annex 1, U.N. Doc. A/40/17 (June 21, 1985), revised by UNCITRAL, Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, 39th Sess., Annex, U.N. Doc. A/61/17 (July 7, 2006) [hereinafter Model Arbitration Law]; UNCITRAL Recommendation, *supra* note 14.

<sup>176</sup> See New York Convention, *supra* note 1, art. II(2); UNCITRAL Compilation Note, *supra* note 178, at 2–7; UNCITRAL Addendum Note, *supra* note 173, at 2–3; UNCITRAL Note, *supra* note 12, ¶¶ 12–15.

<sup>177</sup> UNCITRAL Note, *supra* note 12, ¶ 12 (citing, *inter alia*, Delta Cereales España SL (Spain) v. Barredo Hermanos SA, XXVI Y.B. COMM. ARB. 854, 854–55 (2001) (Spain, Sup. Ct., Oct. 6, 1998); Hertogenbosh, Sneek Hardhout Imp. BV (Neth.) v. Karl Schlueter KG (Ger.), XXI Y.B. COMM. ARB. 643, 644 (1996) (Neth., Court of Appeal, July 14, 1995)).

<sup>178</sup> See New York Convention, *supra* note 1, art. II(2); UNCITRAL Note, *supra* note 12, ¶ 14 (citing, *inter alia*, Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., 186 F.3d 210 (2d Cir. 1999), partially abrogated on other grounds by Sarhank Grp. v. Oracle Corp., 404 F.3d 657, 660 n.2 (2d Cir. 2005); Sphere Drake Ins. PLC v. Marine Towing, Inc., 16 F.3d 666 (5th Cir. 1994); Coutinho Caro & Co., U.S.A. v. Marcus Trading, Inc., No. 3:95CV2362, 2000 WL 435566 (D. Conn. Mar. 14, 2000); Bothell v. Hitachi Zosen Corp., 97 F. Supp. 2d 1048 (W.D. Wash. 2000); Sen Mar Inc. v. Tiger Petroleum Corp., 774 F. Supp. 879 (S.D.N.Y. 1991)).

<sup>179</sup> See New York Convention, *supra* note 1, art. II(2); UNCITRAL Note, *supra* note 12, ¶ 11 (stating that the requirement of “either a signature or an exchange of documents . . . ensures that the parties’ assent to arbitration is expressly recorded”); *id.* ¶ 14 (noting that cases distinguishing the treatment of arbitration agreements and arbitral clauses have not been widely followed).

<sup>180</sup> See UNCITRAL Note, *supra* note 12, ¶ 13.

<sup>181</sup> See *id.* But see *id.* ¶ 17 (citing Delta Cereals Espana SL (Spain) v. Barredo Hermanos SA

While the interpretation of the signature requirement is relatively standard around the world (with the exception of the United States), rules regarding the exchange of documents vary more widely.<sup>182</sup> Some national courts interpret the term “exchange” strictly, meaning both a written offer and a written acceptance of an arbitration provision, while other courts in other states consider “a reference to the arbitration clause or agreement in subsequent correspondence emanating from the party to which the arbitration clause or agreement was sent . . . sufficient.”<sup>183</sup> In some cases, courts consider slightly more liberal treatment to be appropriate if the parties are in an ongoing relationship.<sup>184</sup> In other instances, courts conclude that the requirements of article II(2) have been met even when the arbitration provision was not included in the letters that were exchanged between the parties, so long as the documents that were exchanged made reference to the arbitration.<sup>185</sup> Among the examples cited in the latter category of cases is a U.S. decision that justified its actions by reference to strong national policies in favor of arbitration.<sup>186</sup>

Courts adopting a slightly less strict approach to the form requirement are split as to whether they allow the form requirements to be satisfied through other means.<sup>187</sup> For example, only some of these countries overlook the technical requirements of article II(2) based on principles of estoppel resulting from conduct, leading UNCITRAL to note that “[n]o leading approach is evident from the case law.”<sup>188</sup>

Finally, most states reflect relatively liberal attitudes towards new forms of electronic technology and consider them to fall within the ambit of “letters or telegrams.”<sup>189</sup> In so doing, courts do not take the view that article II(2) names an exclusive list of documents deemed sufficient to evidence an “agreement in writing.”<sup>190</sup> In fact, one Swiss decision notes that unsigned writings are becoming increasingly important in modern electronic commerce, making signature requirements less important.<sup>191</sup> However, other have states adopted a stricter approach to electronic communications.<sup>192</sup>

The decisions discussed in this section revolve around the text of the

---

(Spain), XXVI Y.B. COMM. ARB. 854 (2001) (Spain, Sup. Ct., Oct. 6, 1998) and suggesting the New York Convention allowed agreement through trade usages).

<sup>182</sup> See UNCITRAL Note, *supra* note 12, ¶¶ 14, 35.

<sup>183</sup> *Id.* ¶ 15.

<sup>184</sup> *Id.* ¶ 19.

<sup>185</sup> *Id.* ¶ 20.

<sup>186</sup> See *id.* (citing *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449–50 (3d Cir. 2003)).

<sup>187</sup> See UNCITRAL Note, *supra* note 12, ¶ 16.

<sup>188</sup> See *id.* ¶ 17 (citing *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580 (7th Cir. 2001); *China Nanhai Oil Joint Serv. Corp. Shenzhen Branche (China) v. Gee Tai Holdings Co.*, XX Y.B. COMM. ARB. 671, 673–77 (H.K. High Ct., July 13, 1994) (comparing several jurisdictions); *Greek Co. v. FR German Co.*, XIV Y.B. COMM. ARB. 638, 638–39 (1989) (Greece, Court of Appeal of Athens, 1984)).

<sup>189</sup> See New York Convention, *supra* note 1, art. II(2); UNCITRAL Note, *supra* note 12, ¶ 22.

<sup>190</sup> New York Convention, *supra* note 1, art. II(2); see also UNCITRAL Note, *supra* note 12, ¶ 22 (citing *Chloe Z. Fishing Co. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 1250 (S.D. Cal. 2000)).

<sup>191</sup> UNCITRAL Note, *supra* note 12, ¶ 23 (citing *Compagnie de Nav. et Transports S.A. v. Mediterranean Shipping Co.*, XXI Y.B. COMM. ARB. 690, 697 (Swiss Fed. Trib., 1996)).

<sup>192</sup> UNCITRAL Note, *supra* note 12, ¶ 23 (citing a Norwegian decision concluding that electronic mail did not satisfy the requirements of article II(2)).

Convention itself, and therefore focus on the language of article II(2).<sup>193</sup> However, even those states that take something of a “strict” view towards the interpretation of article II(2) have developed a variety of escape mechanisms to take changing commercial circumstances into account.<sup>194</sup> For the most part, U.S. decisions conform to international norms, although there are a few areas, such as the interpretation of the writing requirement, where the United States is out of step with practices adopted by other signatories of the Convention.<sup>195</sup>

However, the UNCITRAL studies show that not all courts have adopted the same kind of interpretive approach to form requirements under the New York Convention.<sup>196</sup> Some states impose “less demanding requirements,” typically through recourse to broad provisions of national law.<sup>197</sup> Those requirements are discussed in the next section.

### *B. International Interplay Between Article II(2) and Article VII(1) of the New York Convention*

Although U.S. courts very seldom invoke article VII(1) of the New York Convention,<sup>198</sup> that provision is central to many states’ approach to the form requirements under the New York Convention.<sup>199</sup> The text of article VII(1) is quite straightforward, simply stating that:

[t]he provisions of the present Convention shall not . . . deprive any

---

<sup>193</sup> UNCITRAL Note, *supra* note 12, ¶ 12; *see also* New York Convention, *supra* note 1, art. II(2).

<sup>194</sup> *See* New York Convention, *supra* note 1; UNCITRAL Note, *supra* note 12, ¶ 12.

<sup>195</sup> *See* New York Convention, *supra* note 1, art. II(2); *see also supra* notes 35–172 and accompanying text.

<sup>196</sup> *See* New York Convention, *supra* note 1, art. II(2); UNCITRAL Note, *supra* note 12, ¶ 24.

<sup>197</sup> UNCITRAL Note, *supra* note 12, ¶ 12.

<sup>198</sup> Indeed, only a few U.S. decisions even mention article VII of the New York Convention and most appear to deny its successful invocation. *See* New York Convention, *supra* note 1, art. VII; *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999) (denying use of article VII); *Lander Co., Inc. v. MMP Inv., Inc.*, 107 F.3d 476, 481 (7th Cir. 1997) (approving “overlapping coverage” between the FAA and the New York Convention pursuant to article VII); *Int’l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 29 (D.D.C. 2011) (denying use of article VII); *Kailroy Produce Co. v. Pac. Tomato Growers, Inc.*, 730 F. Supp. 2d 1036, 1040 (D.C. Ariz. 2010) (allowing use of article VII, albeit in a context that would allow imposition of domestic law that was less favorable to a party seeking to enforce an arbitral award); *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 267 F. Supp. 2d 1335, 1343–44 (S.D. Fla. 2003) (denying use of article VII and claiming that nothing in previous case law and the text of section 208 “indicates that Chapter 1 is capable of serving as the primary framework for confirming an award ‘not considered as domestic’ under the Convention . . . . Rather, Chapter 1 of the FAA merely augments the Convention to the extent no conflict exists between the two instruments. This Court will utilize Chapter 1 of the FAA accordingly”), *vacated on other grounds*, 377 F.3d 1164 (11th Cir. 2004); *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F. Supp. 2d 279, 288 (S.D.N.Y. 1999) (denying use of article VII); *Arbitration Between Chromalloy Aeroservices and Arab Republic of Egypt*, 939 F. Supp. 907, 914 (D.D.C. 1996) (denying use of article VII); *see also* *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 518 n.4 (2d Cir. 1975) (denying use of article VII in context of a bilateral treaty); *Termorio S.A. E.S.P. v. Electricadora Del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87, 98 (D.D.C. 2006) (citing article VII only in the context of distinguishing *Chromalloy*, 763 F. Supp. 2d at 12), *aff’d*, 487 F.3d 928 (D.C. Cir. 2007).

<sup>199</sup> *See* New York Convention, *supra* note 1, arts. II(2), VII(1); UNCITRAL Note, *supra* note 12, ¶¶ 24–34.

interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.<sup>200</sup>

A proper understanding of article VII is critical to the analysis of form requirements under the Convention, since:

[t]he New York Convention has been described as having a “pro-enforcement” bias in that it seeks to encourage enforcement of awards in the greatest number of cases possible. That purpose was achieved through article VII(1) by removing conditions for recognition and enforcement in national laws that were more stringent than the conditions in the New York Convention, while allowing the continued application of any national provisions that gave special or more favourable rights to a party seeking to enforce an award.<sup>201</sup>

Article VII(1) therefore allows parties seeking to enforce an arbitral agreement or award that falls under the New York Convention to rely on more favorable provisions found in national law.<sup>202</sup> As such, courts around the world have considered use of this provision in situations where domestic law regarding the definition of an “agreement in writing” is more liberal than the requirement found in article II(2).<sup>203</sup>

Recourse to national law through article VII(1) is not without its problems.<sup>204</sup> Indeed, as the Secretary General of the United Nations himself noted:

Some national laws . . . have addressed the problem [of the form requirement under article II(2)] and broadened the definition of writing. While the problem of the outdated form requirement is thereby being dealt with, the fact that these laws contain different solutions creates other difficulties, caused by the disparity of laws. The Working Group may wish to consider that this disparity, which may grow in the future, increases the desirability of finding internationally harmonized solutions. Meanwhile, because the definition in international legislative texts as well as in many national laws has remained unchanged, undesirable consequences continue to arise. They are, for example, that parties may expect to be able to

---

<sup>200</sup> New York Convention, *supra* note 1, art. VII.

<sup>201</sup> UNCITRAL Note, *supra* note 12, ¶ 24 (citing the SG Report, *supra* note 13); *see also* New York Convention, *supra* note 1, arts. II(2), VII(1); SG Report, *supra* note 13, ¶ 21.

<sup>202</sup> *See* Schramm et al., *supra* note 7, at 77; *see also* BORN, *supra* note 7, at 618. However, article VII(1) cannot support application of domestic laws that are less favorable to enforcement of arbitral agreements or awards falling under the New York Convention. *See* Schramm et al., *supra* note 7, at 77; *see also* BORN, *supra* note 7, at 618. Therefore, cases that allow parties to invoke domestic defenses to enforcement of an award subject to the New York Convention based on invocation of article VII are wrongly decided as a matter of international law. *See* Kailroy Produce Co. v. Pac. Tomato Growers, Inc., 730 F. Supp. 2d 1036, 1040 (D. Ariz. 2010) (incorrectly relying on article VII to allow consideration of a defense to enforcement of an arbitral award based on manifest disregard of law).

<sup>203</sup> *See* New York Convention, *supra* note 1, arts. II(2), VII(1); UNCITRAL Note, *supra* note 12, ¶¶ 24–34.

<sup>204</sup> *See* New York Convention, *supra* note 1, art. VII(1).

initiate arbitral proceedings, but their expectations are frustrated. Furthermore, courts, in order to reach results they consider appropriate under the circumstances, have to resort to expansive and even strained interpretations of the definition of writing. In addition, difficulties may arise when awards are rendered relying on laws providing a broader definition of writing but are brought for enforcement to a jurisdiction which has a narrower definition.<sup>205</sup>

These concerns give rise to the question whether article VII(1) should be read to allow states to derogate from the form requirements described in the New York Convention, or whether issues arising under article II(2) should be exempt from that aspect of the Convention.<sup>206</sup> Certainly there is some logic in the idea that the New York Convention was intended to provide a single international standard that would be uniformly applied across national borders, an approach that would seem most valuable in terms of requirements relating to formal validity of arbitration agreements.<sup>207</sup>

Not only is this view consistent with the espoused purposes of the Convention, it provides parties with clarity and predictability, both important goals in the world of international commerce.<sup>208</sup> This approach—which is more consistent with French and Spanish versions of the New York Convention than with English versions—reflects the view that article II(2) constitutes a “minimum” form requirement which would not allow parties to take advantage of more generous provisions of national law.<sup>209</sup>

Ultimately, the minimalist approach falters because it fails to take into account the express language of article VII(1), which allows parties to take advantage of more liberal provisions of national law.<sup>210</sup> Instead, the better and more holistic reading of the Convention is that article VII(1) permits states to invoke more generous provisions of national law even when construing form requirements under article II(2) of the Convention.<sup>211</sup> As such, article II(2) is perhaps more properly said to “establish a ‘maximum’ requirement for formal validity.”<sup>212</sup>

The maximalist reading of article II(2) has found support in a number of court decisions that have “upheld the validity of an arbitration agreement under domestic law, which would not have been considered as valid under the New York Convention.”<sup>213</sup> These opinions either rely explicitly on article VII(1) or simply

---

<sup>205</sup> SG Report, *supra* note 13, ¶ 8. Some of the factual scenarios that can lead to problems are discussed in the Secretary General’s Report. *See id.* ¶¶ 12–16.

<sup>206</sup> *See* New York Convention, *supra* note 1, arts. II(2), VII(1).

<sup>207</sup> *Bautista v. Star Cruises*, 396 F.3d 1289, 1300 (11th Cir. 2005) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)); *see also* UNCITRAL Note, *supra* note 12, ¶ 32.

<sup>208</sup> *See* New York Convention, *supra* note 1; *Bautista*, 396 F.3d at 1300; BORN, *supra* note 7, at 71.

<sup>209</sup> *See* New York Convention, *supra* note 1, art. II(2); BORN, *supra* note 7, at 539–40 (noting these readings typically rely on French and Spanish versions of the New York Convention).

<sup>210</sup> *See* New York Convention, *supra* note 1, arts. II(2), VII(1); BORN, *supra* note 7, at 541.

<sup>211</sup> *See* New York Convention, *supra* note 1, arts. II(2), VII(1); UNCITRAL Note, *supra* note 12, ¶ 24; BORN, *supra* note 7, at 536–37.

<sup>212</sup> BORN, *supra* note 7, at 536.

<sup>213</sup> UNCITRAL Note, *supra* note 12, ¶ 27.

apply domestic law.<sup>214</sup> For example, a number of decisions, including several from the United States, were noted by UNCITRAL for having “cited the New York Convention but then applied domestic legal principles to the question whether the arbitration agreement was valid and enforceable.”<sup>215</sup> Other opinions took the view that the New York Convention did not supersede domestic law.<sup>216</sup>

Some question exists at the international level as to whether article VII(1) applies equally to motions to compel arbitration as well as motions to enforce arbitral awards.<sup>217</sup> A number of states that have addressed that issue have concluded that the more favorable treatment provision can be extended to motions to compel arbitration, even though article VII(1) on its face only refers to enforcement proceedings, an approach that has also been adopted in the United States.<sup>218</sup>

As this discussion shows, there is a great deal of variation in national treatment of form requirements under the New York Convention, regardless of whether courts rely primarily on the Convention or on more generous provisions of national law.<sup>219</sup> While the United States is in accord with international practice in a number of areas, U.S. decisions have been singled out at times as being particularly exceptional.<sup>220</sup>

Although the diversity of national approaches to form requirements under the Convention is in one way legitimate, in that a large number of states appear to be acting in ways that are more generous than that required under the New York Convention,<sup>221</sup> that does not mean that the situation should continue. Indeed, “[d]ifferent judicial interpretations of the form requirement and a trend to avoid the form requirement by reference to other legal doctrines may undermine the principles of the New York Convention and the harmonisation of law regarding recognition and enforcement of arbitration agreements.”<sup>222</sup>

The difficulty, of course, is finding a viable means of imposing a higher degree of international uniformity, given that the Convention itself expressly

---

<sup>214</sup> See *id.* (citing *Petrasol BV (Neth.) v. Stolt Spur Inc. (Lib.)*, XXII Y.B. COMM. ARB. 762, 763 (Neth., Court of First Instance, Rotterdam, Sept. 28, 1995); *Gas Authority of India, Ltd. v. SPIE-CAPAG, SA (Fr.)*, XXIII Y.B. COMM. ARB. 688, 691–701 (India, Delhi High Ct., Oct. 15, 1993)); see also *di Pietro*, *supra* note 7, at 448–49.

<sup>215</sup> UNCITRAL Note, *supra* note 12, ¶¶ 28–29 (citing, *inter alia*, *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 44 (2d Cir. 1993); *Beromun Aktiengesellschaft v. Societa Industriale Agricola “Tresse” di Dr. Domenico e Dr. Antonio dal Ferro*, 41 F. Supp. 1163, 1170 (S.D.N.Y. 1979)). As noted previously, these decisions do not seem to have relied on article VII in any way, but instead appear to have simply assumed that domestic law controlled. See *supra* notes 122–48 and accompanying text.

<sup>216</sup> See UNCITRAL Note, *supra* note 12, ¶ 29 (citing, *inter alia*, *Astor Chocolate Corp. v. Mikroverk Ltd.*, 704 F. Supp. 30, 33 (E.D.N.Y. 1989)).

<sup>217</sup> See *New York Convention*, *supra* note 1, art. VII(1); UNCITRAL Note, *supra* note 12, ¶ 34; *BORN*, *supra* note 7, at 545–46.

<sup>218</sup> See *New York Convention*, *supra* note 1, art. VII(1); UNCITRAL Note, *supra* note 12, ¶ 34 (citing *XL Ins. Ltd. v. Owens Corning*, XXVI Y.B. COMM. ARB. 869, 872 (2001) (United Kingdom, Queen’s Bench Division, Commercial Court, July 28, 2000)); see *supra* notes 216–18 and accompanying text.

<sup>219</sup> See *supra* notes 35–163 and accompanying text.

<sup>220</sup> See *supra* notes 183–91 and accompanying text.

<sup>221</sup> See UNCITRAL Note, *supra* note 12, ¶ 36; see also *supra* notes 216–18 and accompanying text.

<sup>222</sup> UNCITRAL Note, *supra* note 12, ¶ 35.



permits a certain degree of diversity via article VII(1).<sup>223</sup> Over the years, UNCITRAL considered a number of potential solutions to the problems associated with form requirements under the New York Convention.<sup>224</sup> One possibility—known as the UNCITRAL Recommendation—came to fruition in 2006 and is discussed in the next section.<sup>225</sup>

### C. *UNCITRAL Recommendation*

Although UNCITRAL considered a variety of options, including some (such as the amendment of the New York Convention) that would be mandatory in nature, it ultimately decided that an optional protocol was the better course of action.<sup>226</sup> Therefore, the UNCITRAL Recommendation is simply that—a recommendation—although it may be a highly persuasive guide to interpretation of the Convention, particularly under U.S. law.<sup>227</sup>

The UNCITRAL Recommendation is relatively brief in its substantive provisions, stating simply that it:

1. *Recommends* that article II, paragraph 2, of the [New York Convention] be applied recognizing that the circumstances described therein are not exhaustive;
2. *Recommends also* that article VII, paragraph 1, of the [New York Convention] should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.<sup>228</sup>

Although this language does not appear to go very far on its face, the proposed revisions may nevertheless result in a significant change in how form requirements are interpreted and applied in the U.S. and elsewhere.<sup>229</sup>

The UNCITRAL Recommendation has been well-received by a variety of countries, either resulting in affirmative reforms or the reinforcement of existing

<sup>223</sup> See New York Convention, *supra* note 1, art. VII(1).

<sup>224</sup> See *id.* art. II(2); UNCITRAL Note, *supra* note 12, ¶ 36.

<sup>225</sup> See UNCITRAL Recommendation, *supra* note 14; UNCITRAL Note, *supra* note 12, ¶ 36; BORN, *supra* note 7, at 617–19; Schramm et al., *supra* note 7, at 74–79.

<sup>226</sup> See UNCITRAL Recommendation, *supra* note 14; SG Report, *supra* note 13, ¶ 18. Calls are occasionally made to revise or replace the New York Convention and are met with varying degrees of receptivity. See Charles H. Brower, II & Jeremy K. Sharpe, *The Coming Crisis in the International Adjudication System*, 19 ARB. INT'L 415, 438 (2003); Carolyn B. Lamm, *Comments on the Proposal to Amend the New York Convention*, in 50 YEARS OF THE NEW YORK CONVENTION 697, 706 (Albert Jan van den Berg ed., XIV ICCA Cong. Ser. 2009). Though there may or may not be merit to those proposals in other contexts, it has been said that amending the New York Convention would not be a wise solution to the problems associated with form requirements, particularly in light of other viable alternatives. See Landau, *supra* note 7, at 61–79.

<sup>227</sup> See *infra* notes 273–76 and accompanying text.

<sup>228</sup> UNCITRAL Recommendation, *supra* note 14.

<sup>229</sup> See New York Convention, *supra* note 1, art. II(2); see *infra* notes 265–79 and accompanying text.

approaches to article II(2).<sup>230</sup> The early success of the Recommendation suggests that its provisions will soon be put into effect elsewhere. When considering how to implement this particular instrument, national courts should bear in mind the factors that motivated UNCITRAL to act. For example, the UNCITRAL Recommendation indicates, in part, that it was drafted:

*Taking into account* article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

*Considering* the wide use of electronic commerce,

*Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

*Taking into account* also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement [sic] governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards.<sup>231</sup>

These rationales lead to the same conclusions as the Recommendation itself, namely that courts should (1) rely on the most favorable provision of law available (be it domestic or international) so as to give effect to an arbitration agreement or award and (2) take changes in technology into account when considering whether form requirements have been met. However, this list of motivating factors is important because it demonstrates that the UNCITRAL Recommendation is not simply the opinion of a single body (i.e., UNCITRAL). Instead, the list of reasons why the Recommendation was adopted shows that the UNCITRAL Recommendation is based on international consensus both with respect to "enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement[s]" and regarding the increasingly widespread recognition of electronic commerce and legal practices.<sup>232</sup> Furthermore, these supporting rationales reiterate the notion that "greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes,"<sup>233</sup> thus reminding nations

---

<sup>230</sup> See New York Convention, *supra* note 1, art. II(2); UNCITRAL Compilation Note, *supra* note 173, at 2–6; UNCITRAL Addendum Note, *supra* note 173, at 2–3.

<sup>231</sup> UNCITRAL Recommendation, *supra* note 14 (citations omitted).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* (quoting a resolution from the Conference of Plenipotentiaries that prepared and opened the New York Convention for signature).

around the world to consider not only their own domestic law when deciding to implement the UNCITRAL Recommendation, but also practices in other countries.

#### *D. The UNCITRAL Model Arbitration Law*

When considering how to address the inconsistencies that arose as a result of national courts' interpretation and application of article II(2) of the New York Convention, UNCITRAL did not limit itself to enactment of the UNCITRAL Recommendation.<sup>234</sup> UNCITRAL simultaneously made several amendments to the Model Arbitration Law, including several key changes to article 7, which contains the statutory form requirements.<sup>235</sup> The United States has not adopted either the original (1985) or amended (2006) version of the Model Arbitration Law, but the instrument has been very successful internationally, with sixty-six countries and seven U.S. states adopting its provisions in whole or in part.<sup>236</sup>

Although the Model Arbitration Law is not binding as a matter of U.S. federal law, the 2006 revisions may shed light into the proper reading of article II(2) of the New York Convention, even if only in a persuasive manner.<sup>237</sup> Indeed, UNCITRAL specifically noted the relevance of the 2006 Model Arbitration Law in the UNCITRAL Recommendation, which suggests that the two documents should be read together.<sup>238</sup> The United Nations General Assembly has also noted the connection between the revised Model Arbitration Law and the UNCITRAL Recommendation as a means of promoting uniformity in the interpretation and application of the New York Convention.<sup>239</sup> Therefore, it is appropriate for courts to consider the revisions to the Model Arbitration Law when deciding issues relating to article II(2) of the New York Convention, even if that jurisdiction has not formally adopted the Model Law itself.<sup>240</sup>

Article 7 of the revised Model Arbitration Law discusses form requirements associated with international commercial arbitration and provides two different options for states to consider.<sup>241</sup> These provisions read:

#### Option I

#### Article 7. Definition and form of arbitration agreement

---

<sup>234</sup> See New York Convention, *supra* note 1, art. II(2); UNCITRAL Recommendation, *supra* note 14.

<sup>235</sup> See Model Arbitration Law, *supra* note 175.

<sup>236</sup> See UNCITRAL, Status: 1985 UNCITRAL Model Law on International Commercial Arbitration, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (last visited Jan. 17, 2012) [hereinafter UNCITRAL Status].

<sup>237</sup> See Schramm et al., *supra* note 7, at 75–77.

<sup>238</sup> See New York Convention, *supra* note 1, art. II(2); UNCITRAL Recommendation, *supra* note 14.

<sup>239</sup> See G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [hereinafter General Assembly Resolution]. See generally New York Convention, *supra* note 1; Model Arbitration Law, *supra* note 175; UNCITRAL Recommendation, *supra* note 14.

<sup>240</sup> See New York Convention, *supra* note 1, art. II(2); Model Arbitration Law, *supra* note 175.

<sup>241</sup> See Model Arbitration Law, *supra* note 175, art. 7.

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

## Option II

### Article 7. Definition of arbitration agreement

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.<sup>242</sup>

Notably, both of these options use a more expansive definition of an arbitration agreement than is reflected in article II(2) of the New York Convention, although the second alternative is obviously the broader of the two texts.<sup>243</sup> The usefulness of these provisions to U.S. courts is discussed in the next section, which contains proposals about the future direction of U.S. law concerning form

---

<sup>242</sup> *Id.*

<sup>243</sup> See New York Convention, *supra* note 1, art. II(2). The second option eliminates the writing requirement altogether. See James E. Costello, *Unveiling the 2010 UNCITRAL Arbitration Rules*, 65 DISP. RESOL. J. 21, 147 (May-Oct. 2010).

requirements under the New York Convention.<sup>244</sup>

#### IV. FUTURE DIRECTION OF U.S. LAW CONCERNING FORM REQUIREMENTS

The purpose of this Article was twofold. First, the aim was to identify whether there was a problem with the manner in which U.S. law applied and interpreted article II(2) of the New York Convention.<sup>245</sup> Second, if a problem did exist, the goal was to provide a realistic proposal for improving the situation.

With respect to the first objective, the preceding discussion clearly demonstrates some significant issues relating to how U.S. courts address form requirements in actions arising under the New York Convention.<sup>246</sup> Inconsistencies exist at several levels. First, the interpretation of the language of article II(2) itself varies from circuit to circuit, particularly with respect to the signature requirement.<sup>247</sup> Furthermore, the current approach to an “exchange of letters or telegrams” requires a highly fact-specific analysis, the outcome of which is difficult for parties to predict in advance.<sup>248</sup>

Second, courts occasionally rely on domestic law without regard to the Convention regime.<sup>249</sup> Although the FAA may be more favorable in ways to those wishing to enforce an arbitration agreement or award, the current jurisprudence demonstrates analytical shortcomings that could lead to problems for the unwary.<sup>250</sup> It also creates an unpredictable situation that is troubling for international actors.

Third, courts attempting to meld domestic and international approaches to form requirements may be laying the groundwork for another circuit split by adopting standards inconsistently across jurisdictional lines.<sup>251</sup> Courts that use this approach may simply be repackaging existing problems into new forms, at least to the extent that the newly enunciated standards incorporate old understandings of how article II(2) is to be interpreted and applied.<sup>252</sup> Finally, the fact that U.S. courts have adopted three different analytical models—each with its own potential grounds for inconsistency—creates its own independent kind of trouble.

The New York Convention was obviously never intended to generate this much variation in the way its terms were interpreted and applied.<sup>253</sup> Therefore, the second goal of this Article must be undertaken: the identification of a viable proposal for reform.

When considering how to address the problems associated with the form requirements of the New York Convention, it is important for courts and Congress to consider not only domestic principles of law, but international ones as well.<sup>254</sup>

---

<sup>244</sup> *See id.*

<sup>245</sup> *See id.*

<sup>246</sup> *See id.*; *see also supra* notes 23–172 and accompanying text.

<sup>247</sup> *See supra* notes 72–107 and accompanying text.

<sup>248</sup> *See supra* notes 108–21 and accompanying text.

<sup>249</sup> *See supra* notes 122–48 and accompanying text.

<sup>250</sup> *See supra* note 134 and accompanying text.

<sup>251</sup> *See supra* notes 164–72 and accompanying text.

<sup>252</sup> *See New York Convention, supra* note 1, art. II(2).

<sup>253</sup> *See id.*

<sup>254</sup> *See id.*; BORN, *supra* note 7, at 544.

This international focus is necessary and appropriate for both legal and pragmatic reasons.

For example, "delegates to the [New York] Convention voiced frequent concern that courts of signatory countries . . . should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements."<sup>255</sup> In adopting and ratifying the New York Convention, Congress embraced that view of the Convention's purpose and procedure as well, and federal courts of all levels have been charged with implementing this kind of internationally minded approach.<sup>256</sup> Furthermore, an internationally oriented method of interpretation is in accordance with international principles regarding treaty interpretation.<sup>257</sup> Therefore, looking to international practices and norms is the right way to proceed as a matter of law.

A transnational approach to the New York Convention also makes good business sense because it helps facilitate the "orderliness and predictability essential to any international business transaction."<sup>258</sup> The failure to create consistent standards across borders can frustrate party expectations about the initiation of proceedings or enforcement awards as well as increase transactional costs, to the extent that parties must go to court to establish their various rights and responsibilities.<sup>259</sup>

Admittedly, it is somewhat difficult for the United States to adopt a truly international approach to article II(2) in the absence of a global consensus about the precise rules to be used in interpreting and applying the provision in question.<sup>260</sup>

<sup>255</sup> See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974); *Bautista v. Star Cruises*, 396 F.3d 1289, 1300 (11th Cir. 2005).

<sup>256</sup> See *Scherk*, 417 U.S. at 520 n.15; *Bautista*, 396 F.3d at 1300; see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

<sup>257</sup> See Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (stating that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose") [hereinafter Vienna Convention]. Although the Vienna Convention has not been ratified by the United States, it has been relied upon by several members of the U.S. Supreme Court and in numerous lower federal opinions. See, e.g., *Abbott v. Abbott*, 130 S. Ct. 1983, 2007 n.11 (2010) (Stevens, J., dissenting); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 391 (2006) (Breyer, J., dissenting); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting). Some circuits consider the Vienna Convention "an authoritative guide to the customary international law of treaties," insofar as it reflects actual state practices." *Mora v. New York*, 524 F.3d 183, 196 n.19 (2d Cir. 2008). Furthermore, "[t]he Department of State considers the Vienna Convention on the Law of Treaties an authoritative guide to current treaty law and practice." *Id.* Although the Vienna Convention has a non-retroactivity clause, see Vienna Convention, *supra*, art. 4, the United States acceded to the New York Convention on September 30, 1970, several months after signing the Vienna Convention. See UNCITRAL, Status: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Jan. 3, 2012); United Nations Treaty Collection, Status: Vienna Convention on the Law of Treaties, [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Tcmp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Tcmp=mtdsg3&lang=en) (last visited Jan. 3, 2012). Therefore, the interpretive techniques outlined in the Vienna Convention can be appropriately applied to questions involving the New York Convention. See New York Convention, *supra* note 1; Vienna Convention, *supra*.

<sup>258</sup> *Scherk*, 417 U.S. at 516; see also New York Convention, *supra* note 1; *Mitsubishi Motors*, 473 U.S. at 627.

<sup>259</sup> See SG Report, *supra* note 13, ¶ 8.

<sup>260</sup> See New York Convention, *supra* note 1, art. II(2); see also *supra* notes 181–230 and accompanying text.

However, recent studies—including those undertaken by UNCITRAL—suggest that an increasing number of states are moving to liberalize their treatment of the form requirements in the New York Convention.<sup>261</sup> In fact, several countries have already done so. Furthermore, UNCITRAL has identified several ways that individual nations can participate in this process, an endeavor that will not only help further one of the primary goals of the New York Convention (i.e., the wide enforceability of international arbitration agreements and awards), but will also help achieve a second aim, namely the harmonization of national laws on arbitration.<sup>262</sup>

There are three means by which states can improve their approach to form requirements under the New York Convention.<sup>263</sup> These are:

- (1) interpreting article II(2) in a “non-exhaustive” manner;
- (2) allowing article VII(1) to be used to allow parties to rely on more favorable provisions of national law when seeking to compel arbitration or enforce an arbitral award;
- (3) adopting the Model Arbitration Law, in particular article 7 concerning form requirements.<sup>264</sup>

Courts and legislatures may adopt these proposals individually or collectively. Each of the three options is discussed in turn below.

#### *A. Adoption of an Expansive Reading of Article II(2) of the New York Convention*

The first method by which change can occur in the U.S. legal order is if U.S. courts were to explicitly adopt that part of the UNCITRAL Recommendation indicating that article II(2) of the New York Convention should “be applied recognizing that the circumstances described therein are not exhaustive.”<sup>265</sup> As it turns out, this would be a relatively easy proposal to adopt.

At this point, no U.S. court has referred to the UNCITRAL Recommendation in any judicial opinion. However, UNCITRAL reports and recommendations have proven persuasive to federal courts in other contexts where Congress has adopted an instrument drafted by UNCITRAL.<sup>266</sup> In fact, at least one federal court has looked to a UNCITRAL report to help construe the provisions of a state statute based on the UNCITRAL Model Arbitration Law.<sup>267</sup>

<sup>261</sup> See New York Convention, *supra* note 1, art. II(2); UNCITRAL Note, *supra* note 12; Landau, *supra* note 7, at 51; see also *supra* notes 181–230 and accompanying text.

<sup>262</sup> See New York Convention, *supra* note 1, art. II(2); UNCITRAL Recommendation, *supra* note 14.

<sup>263</sup> See New York Convention, *supra* note 1.

<sup>264</sup> See UNCITRAL Recommendation, *supra* note 14; UNCITRAL Note, *supra* note 12, ¶ 36.

<sup>265</sup> UNCITRAL Recommendation, *supra* note 14.

<sup>266</sup> See *In re Condor Ins. Ltd.*, 601 F.3d 319, 321, 326 (5th Cir. 2010) (citing a UNCITRAL Working Group Report when construing the provisions of the UNCITRAL Model Law on Cross-Border Insolvency, which has been implemented into domestic law).

<sup>267</sup> See *Bahrain Telecomms. Co. v. Discoverytel, Inc.*, 476 F. Supp. 2d 176, 183–84 (D. Conn.

The fact that the UNCITRAL Recommendation postdates U.S. ratification of the New York Convention is not in any way problematic.<sup>268</sup> The U.S. Supreme Court itself has noted that it is appropriate, when construing an international treaty that has been incorporated into domestic U.S. law, to consider “‘the postratification understanding’ of signatory nations.”<sup>269</sup> This view is in accordance with general principles of public international law and the interpretive approach set forth in the Vienna Convention on the Law of Treaties.<sup>270</sup> Therefore, U.S. courts can and indeed should consider the UNCITRAL Recommendation as highly persuasive authority regarding the interpretation of article II(2), even though the Recommendation was enacted after the adoption of the New York Convention.<sup>271</sup>

In one way, this step might appear unnecessary, since a number of lower federal courts already interpret article II(2) relatively broadly.<sup>272</sup> However, it would be better for courts to rely explicitly on the UNCITRAL Recommendation, since that will demonstrate the United States’ desire to conform with international practices and norms by embracing “greater uniformity of national laws on arbitration.”<sup>273</sup>

While lower federal courts are certainly empowered to take this step on their own, it may be best if the Supreme Court were to address this issue, perhaps by granting certiorari to resolve existing circuit splits regarding the interpretation of article II(2).<sup>274</sup> Indeed, certiorari has already been sought on this and related issues in the past.<sup>275</sup>

While it is easy to say that article II(2) should “be applied recognizing that the circumstances described therein are not exhaustive,” putting that edict into practice may be slightly more difficult, since judges may wonder where precisely to draw the line.<sup>276</sup> Courts could adopt a variety of approaches under the UNCITRAL Recommendation, but the best may be to “dispense with all formal requirements for international arbitration agreements and instead consider solely the question

---

2007); see also Model Arbitration Law, *supra* note 175. The fact that the report providing guidance on the interpretation of the Model Arbitration Law was published after the state had enacted its version of the Law created no interpretive difficulties. See *Bahrain Telecomms.*, 476 F. Supp. 2d at 184 (citing a 2005 UNCITRAL report); UNCITRAL Status, *supra* note 236 (noting Connecticut adopted the Model Arbitration Law in 2000); Model Arbitration Law, *supra* note 175.

<sup>268</sup> See New York Convention, *supra* note 1; UNCITRAL Recommendation, *supra* note 14.

<sup>269</sup> *Medellin v. Texas*, 552 U.S. 491, 507 (2008) (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)).

<sup>270</sup> See Vienna Convention, *supra* note 262, art. 31(3)(a) (stating in part that when interpreting treaties, “[t]here shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”); Landau, *supra* note 7, at 74–79. For the persuasiveness of the Vienna Convention in U.S. law, see *supra* note 262.

<sup>271</sup> See New York Convention, *supra* note 1, art. II(2); UNCITRAL Recommendation, *supra* note 14.

<sup>272</sup> See New York Convention, *supra* note 1, art. II(2); see also *supra* notes 204–30 and accompanying text.

<sup>273</sup> UNCITRAL Recommendation, *supra* note 14; see also New York Convention, *supra* note 1; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974); *Bautista v. Star Cruises*, 396 F.3d 1289, 1300 (11th Cir. 2005).

<sup>274</sup> See *supra* notes 75–154 and accompanying text.

<sup>275</sup> See *supra* notes 4–5 and accompanying text.

<sup>276</sup> UNCITRAL Recommendation, *supra* note 14.



whether or not a party [has] in fact consented to an arbitration agreement.”<sup>277</sup> Alternatively, courts could state that the requirement of a writing will be construed not as meaning “either an ‘exchange’ of writings or ‘signed’ writings, but merely . . . some written evidence of an agreement to arbitrate.”<sup>278</sup> Either approach would be an improvement over current practices and would have the benefit of (1) expanding the realm of arbitrable disputes and arbitration agreements and (2) reducing unnecessary litigation. Furthermore, neither approach violates the fundamental concept that a person cannot be required to arbitrate a dispute without consenting to do so, since there still must be evidence of an agreement to arbitrate.<sup>279</sup>

*B. Explicit Adoption of Domestic Legal Standards Through Reliance on Article VII(1) of the New York Convention*

The second way in which change can be effected in the United States is through the explicit adoption of the second portion of the UNCITRAL Recommendation, which states that article VII(1) “should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.”<sup>280</sup> Notably, the language in the Recommendation covers both motions to compel arbitration and motions to enforce arbitral awards, which eliminates one potential area of dispute.<sup>281</sup>

Adopting this aspect of the UNCITRAL Recommendation would allow U.S. courts to apply the legal standards enunciated in section 2 of the FAA even in cases arising under article II(2) of the New York Convention.<sup>282</sup> This is permitted as a matter of international law because U.S. domestic law regarding form requirements is more favorable to enforcement of an arbitration agreement or award than is article II(2) of the Convention.<sup>283</sup> Furthermore, adopting the UNCITRAL Recommendation is consistent with U.S. policy favoring expansive interpretation of arbitral agreements and easy enforceability of arbitral awards.<sup>284</sup>

In many ways, it would be best if the U.S. Supreme Court were to adopt this approach, since that would facilitate the harmonization of judicial practices nationwide, thus increasing predictability in this area of law.<sup>285</sup> However, lower

<sup>277</sup> BORN, *supra* note 7, at 618; *see also* UNCITRAL Recommendation, *supra* note 14.

<sup>278</sup> BORN, *supra* note 7, at 618 (citations omitted).

<sup>279</sup> *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (noting arbitration “is a matter of consent, not coercion”).

<sup>280</sup> UNCITRAL Recommendation, *supra* note 14.

<sup>281</sup> *See id.*; *see also supra* notes 47–56 and accompanying text.

<sup>282</sup> *See* New York Convention, *supra* note 1, arts. II(2), VII(1); Federal Arbitration Act, 9 U.S.C. § 2 (2011); UNCITRAL Recommendation, *supra* note 14.

<sup>283</sup> *See* New York Convention, *supra* note 1, arts. II(2), VII(1); 9 U.S.C. § 2; BORN, *supra* note 7, at 607 (noting “[l]ower U.S. courts have repeatedly held that the FAA’s written form requirements are less demanding than those of the New York Convention”).

<sup>284</sup> *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985); UNCITRAL Recommendation, *supra* note 14.

<sup>285</sup> These are both goals of the New York Convention and the U.S. Supreme Court. *See* New York Convention, *supra* note 1; UNCITRAL Recommendation, *supra* note 14; *Mitsubishi Motors*, 473 U.S. at 627; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974).

federal courts are also empowered, if not required, to take the UNCITRAL Recommendation into account in relevant cases.<sup>286</sup> Indeed, UNCITRAL's explicit recommendation that article VII(1) be relied upon by national courts to increase the enforceability of arbitral awards and agreements is highly persuasive evidence of the proper reading of the Convention, even if this understanding of the Convention is enunciated postratification.<sup>287</sup>

When adopting this approach, judges should make explicit mention of article VII(1) and the UNCITRAL Recommendation, so as to demonstrate U.S. adherence to international norms and practices.<sup>288</sup> However, courts need to exercise some care, since article VII(1) is not limited only to issues relating to article II(2).<sup>289</sup> Blanket adoption of the second element of the UNCITRAL Recommendation might have repercussions beyond form requirements unless courts expressly limit their holdings to issues relating to article II(2).<sup>290</sup>

Of course, some judges might decide that they want to utilize article VII(1) in a more comprehensive manner.<sup>291</sup> That is perfectly acceptable as a matter of international law, although it is important to recall that article VII(1) is only applicable to those provisions of national law that are more liberal than the New York Convention is with respect to the enforcement of arbitration agreements and awards.<sup>292</sup> Article VII(1) cannot be relied upon to give effect to national laws that reflect standards of enforcement that are more restrictive than those found in the New York Convention.<sup>293</sup>

Although article VII(1) has not been used extensively by U.S. courts in the past, adoption of this portion of the UNCITRAL Recommendation does not constitute a radical change from current practice.<sup>294</sup> Instead, it simply provides an internationally sound basis for relying on domestic law. Courts are already applying aspects of domestic U.S. law to disputes arising under the New York Convention, although the judges' rationales for doing so often differ from case to case.<sup>295</sup> The current approach therefore leads to inconsistencies of practice and

---

<sup>286</sup> See UNCITRAL Recommendation, *supra* note 14; see also *supra* notes 273–76 and accompanying text.

<sup>287</sup> See *Medellin v. Texas*, 552 U.S. 491, 507 (2008); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

<sup>288</sup> See New York Convention, *supra* note 1, art. VII(1); UNCITRAL Recommendation, *supra* note 14; see also *supra* note 278 and accompanying text.

<sup>289</sup> See New York Convention, *supra* note 1, arts. II(2), VII(1); UNCITRAL Recommendation, *supra* note 14.

<sup>290</sup> See New York Convention, *supra* note 1, arts. II(2), VII(1); UNCITRAL Recommendation, *supra* note 14.

<sup>291</sup> See New York Convention, *supra* note 1, art. VII(1).

<sup>292</sup> See *id.*

<sup>293</sup> See *id.*; *Lander Co. v. MMP Inv., Inc.*, 107 F.3d 476, 481 (7th Cir. 1997) (correctly applying article VII(1) and approving "overlapping coverage" between the FAA and the New York Convention pursuant to article VII). But see *Kailroy Produce Co. v. Pac. Tomato Growers, Inc.*, 730 F. Supp. 2d 1036, 1040 (D.C. Ariz. 2010) (incorrectly applying article VII(1) and using it to rely on domestic law that was less favorable to a party seeking to enforce an arbitral award).

<sup>294</sup> See New York Convention, *supra* note 1, art. VII(1); UNCITRAL Recommendation, *supra* note 14; see also *supra* note 203 and accompanying text.

<sup>295</sup> See New York Convention, *supra* note 1. Currently, a court may apply domestic U.S. law to issues relating to form requirements under the New York Convention because (1) the court believes that it is permitted or required to do so by sections 202 or 208 of the FAA; (2) the court fails to appreciate how international legal standards apply to the question at bar; or (3) the court is attempting to

outcome that are contrary to the enunciated purposes of the New York Convention.<sup>296</sup>

A good deal of confusion could be eliminated through explicit reliance on domestic law via article VII(1) of the Convention.<sup>297</sup> If nothing else, problems associated with the need for a “signed” writing would disappear, since section 2 of the FAA does not require signatures.<sup>298</sup> This would put the United States more in line with international commercial practice, which is also seeing a decreased reliance on signatures in the formal sense.<sup>299</sup>

This approach is also acceptable to the international legal order, since its methodology is consistent with both the explicit terms of the New York Convention and existing international legal practices.<sup>300</sup> Indeed, numerous national courts have already adopted this approach to article VII(1) so as to be able to interpret form requirements by reference to more favorable national law.<sup>301</sup>

Finally, adopting this second portion of the UNCITRAL Recommendation does not in any way violate the concept of consent as being at the core of arbitration.<sup>302</sup> Even though the signature requirement would be omitted, for example, courts would still need to find that an agreement to arbitrate existed.<sup>303</sup>

That is not to say that this approach is free of all problems. For example, U.S. case law is already subject to confusion and circuit splits, even with respect to the simpler requirements under section 2 of the FAA.<sup>304</sup> Increasing the opportunity for diversity may not be wise, given the need for predictability and consistency in this area of law. Widespread reliance on article VII(1) by U.S. courts could also lead to difficulties at the time of enforcement if judges in the United States were to compel arbitration of a wider range of disputes than would be enforceable in other states.<sup>305</sup> However, concerns of this type were not enough to stop UNCITRAL from enacting the Recommendation and therefore should not stand in the way of the United States’ judicious use of article VII(1) in cases involving form requirements.<sup>306</sup>

---

harmonize domestic and international law. See New York Convention, *supra* note 1, art. II(2); Federal Arbitration Act, 9 U.S.C. §§ 2, 202, 208 (2011); see also *supra* notes 69–172 and accompanying text.

<sup>296</sup> See New York Convention, *supra* note 1; Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974); Bautista v. Star Cruises, 396 F.3d 1289, 1300 (11th Cir. 2005).

<sup>297</sup> See New York Convention, *supra* note 1, art. VII(1).

<sup>298</sup> See *id.* art. II(2); 9 U.S.C. § 2; BORN, *supra* note 7, at 608 (noting multiple cases holding that tacit acceptance of an unsigned arbitration agreement or exchange of documents is permitted in domestic disputes arising under section 2 of the FAA).

<sup>299</sup> See BORN, *supra* note 7, at 617; see also *Compagnie de Nav. et Transports S.A. v. Mediterranean Shipping Co.*, XXI Y.B. COMM. ARB. 690, 697 (Swiss Fed. Trib., 1996) (noting “with the development of modern means of communication, unsigned written documents have an increasing importance and diffusion, [such] that the need for a signature inevitably diminishes, especially in international commerce”).

<sup>300</sup> See New York Convention, *supra* note 1, art. VII(1).

<sup>301</sup> See *id.* arts. II(2), VII(1); BORN, *supra* note 7, at 541–42; di Pietro, *supra* note 7, at 447.

<sup>302</sup> See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

<sup>303</sup> See BORN, *supra* note 7, at 618; see *supra* note 284 and accompanying text.

<sup>304</sup> See Federal Arbitration Act, 9 U.S.C. § 2 (2011); BORN, *supra* note 7, at 608 (discussing domestic case law).

<sup>305</sup> See New York Convention, *supra* note 1, art. VII(1); Landau, *supra* note 7, at 51.

<sup>306</sup> See New York Convention, *supra* note 1, art. VII(1); SG Report, *supra* note 13, ¶ 8; see also *supra* note 210 and accompanying text.

### C. Adoption of Article 7 of the UNCITRAL Model Arbitration Law

The third and final proposal for resolving the problems associated with form requirements in disputes arising under the New York Convention focuses more on legislative rather than judicial action. Essentially, Congress could eliminate many of the existing difficulties by replacing existing legislation concerning form requirements for arbitration with some version of article 7 of the Model Arbitration Law.<sup>307</sup>

This is perhaps the most expansive response to the problems associated with form requirements, but it does have the benefit of addressing the situation in a consistent and comprehensive manner rather than relying on piecemeal resolution through the courts. This is not to say that judges would not need to be involved in this type of reform measure, since the courts would still need to give effect to these new provisions of domestic law through article VII(1) of the New York Convention, but the courts would have a much clearer indication of the standards that they should apply to any particular dispute if Congress were to adopt some form of the revised Model Arbitration Law.<sup>308</sup>

UNCITRAL proposed two different versions of article 7 of the Model Arbitration Law, with Option 2 being much more broad-reaching than Option 1.<sup>309</sup> Indeed, Option 2 eliminates the writing requirement altogether.<sup>310</sup>

Option 2 is the better of the two options and is the alternative recommended herein for adoption in the United States. However, commentators have also remarked favorably on Option 1.<sup>311</sup> The full text of Option 1 of the Model Arbitration Law is reproduced above,<sup>312</sup> but several provisions should be noted here as being particularly useful.

First, article 7(3) of Option 1 states that “[a]n arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.”<sup>313</sup> This provision is helpful because it identifies the variety of ways in which an agreement to arbitrate may be made and distinguishes issues relating to the creation of an agreement to arbitrate from the ways in which the contents of the agreement may be demonstrated. As such, this language meets the needs of those who believe a writing is primarily necessary to demonstrate the content of an arbitration agreement rather than consent to such an agreement.<sup>314</sup>

Although article 7(3) should be central to any legislative reform contemplated by Congress, article 7 contains other useful suggestions as well. For

<sup>307</sup> See 9 U.S.C. §§ 2, 202; Model Arbitration Law, *supra* note 175, art. 7.

<sup>308</sup> See New York Convention, *supra* note 1, art. VII(1); Schramm et al., *supra* note 7, at 77.

<sup>309</sup> See Model Arbitration Law, *supra* note 175, art. 7.

<sup>310</sup> See Model Arbitration Law, *supra* note 175, art. 7, Option 2; Costello, *supra* note 243, at 147.

<sup>311</sup> See Kucherepa, *supra* note 7, at 425; Schramm et al., *supra* note 7, at 75–78. Indeed, some states have already adopted this alternative. See Kim M. Rooney, *The New Hong Kong Arbitration Law*, 16 IBA ARB. NEWS 51, 53 (Mar. 2011).

<sup>312</sup> See *supra* note 247 and accompanying text.

<sup>313</sup> Model Arbitration Law, *supra* note 175, art. 7.

<sup>314</sup> See Landau, *supra* note 7, at 20–23 (noting the two functions of the writing requirement are to prove consent and to prove content); Schramm et al., *supra* note 7, at 74 (noting UNCITRAL’s view that the writing requirement is meant to demonstrate content, not consent).

example, articles 7(4), 7(5) and 7(6) of Option 1 provide further examples of the ways in which the writing requirement can be met.<sup>315</sup> Technical innovations are discussed in section (4), waiver arguments are addressed in section (5) and incorporation by reference is covered in section (6).<sup>316</sup> Although incorporation of any or all of these provisions into a revised FAA would doubtless reduce confusion and hence litigation, many of these issues have already been addressed in the United States, at least to some extent, through case law.<sup>317</sup> That is not to say that statutory guidance would not be beneficial, but simply to note that subsection (3) is a critical addition to any reform measure, while subsections (4) through (6) are merely helpful.<sup>318</sup>

Although Congress can act with somewhat more freedom than can courts, it still must take care that any reforms in the area of international commercial arbitration comply with the United States' treaty obligations under the New York Convention.<sup>319</sup> In adopting the 2006 version of the Model Arbitration Law, in whole or in part, Congress would obviously be on very safe ground.<sup>320</sup> Not only was the Model Arbitration Law drafted by UNCITRAL itself, but UNCITRAL specifically stated in 2005 that "the wide adoption by States" of the revised version of article 7 of the Model Arbitration Law "could provide a useful means of achieving greater uniformity as to the form requirement [of the New York Convention], which [would be] more responsive to the needs of modern arbitration."<sup>321</sup> Furthermore, the United Nations General Assembly has recognized that the Model Arbitration Law's revised approach to form requirements was not only "the subject of due deliberation and extensive consultations with Governments and interested circles," but that it "would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes," thus fulfilling the purposes of the New York Convention.<sup>322</sup> Therefore, congressional efforts to adopt article 7 of the Model Arbitration Law would comply with the United States' international obligations.<sup>323</sup>

---

<sup>315</sup> See Model Arbitration Law, *supra* note 175, art. 7. Articles 7(1) and 7(2) of the revised Model Arbitration Law essentially reiterate the current U.S. approach to form requirements. See *id.* art. 7(1)-(2); BORN, *supra* note 7, at 607-09. As such, articles 7(1) and 7(2) are therefore largely uncontroversial.

<sup>316</sup> See Model Arbitration Law, *supra* note 175, art. 7.

<sup>317</sup> See BORN, *supra* note 7, at 607-09.

<sup>318</sup> See Federal Arbitration Act, 9 U.S.C. § 2 (2011); Model Arbitration Law, *supra* note 175, art. 7.

<sup>319</sup> See New York Convention, *supra* note 1. The U.S. Supreme Court has stated that the most recently enacted provision will control in cases of conflict between federal legislation and non-self-executing international treaties. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). However, the Supreme Court recognized that there is nevertheless an international obligation "to avoid hostile legislation" concerning the subject of the treaty. *Id.* at 193. Therefore, although Congress may act as it pleases, it should bear in mind duties imposed on the United States by an international treaty. This is particularly appropriate where, as here, the purpose of the legislative enactment is to give further and better effect to the purposes and provisions of an international treaty.

<sup>320</sup> See Model Arbitration Law, *supra* note 175.

<sup>321</sup> UNCITRAL Note, *supra* note 12, ¶ 36; see also New York Convention, *supra* note 1, art. II(2); Model Arbitration Law, *supra* note 175.

<sup>322</sup> General Assembly Resolution, *supra* note 239; see also New York Convention, *supra* note 1; Model Arbitration Law, *supra* note 175.

<sup>323</sup> See Model Arbitration Law, *supra* note 175, art. 7.

## V. CONCLUSION

As the preceding discussion shows, the United States’ current approach to the interpretation and application of the form requirements of the New York Convention is problematic at both the national and international levels.<sup>324</sup> Not only is the existing state of affairs contrary to the purposes and policies of both the New York Convention and U.S. law, it is also completely unnecessary.<sup>325</sup>

International commercial and arbitral practice has advanced to a sufficient stage of sophistication that a highly technical form requirement is no longer needed. Archaic form requirements hinder international commerce and arbitration by (1) reducing the number of disputes that can be sent to arbitration or the awards that can be enforced internationally and (2) decreasing the predictability that is at the cornerstone of efficient international trade.<sup>326</sup>

A large number of states have already restricted the need for written form requirements so as to meet the evolving demands of the international business community.<sup>327</sup> While the United States also reflects this more liberal approach from time to time, there is no consistency in how U.S. courts address this issue.<sup>328</sup>

However, recent developments have created an environment that is ripe for change.<sup>329</sup> Three different routes to reform are possible: judicial adoption of an expansive reading of article II(2) of the New York Convention; judicial recognition of article VII(1) of the Convention as a means of relying on more favorable provisions of national law found in section 2 of the FAA; and congressional adoption of article 7 of the 2006 version of the Model Arbitration Law, in whole or in part, in conjunction with judicial reliance on article VII(1) of the New York Convention so as to give international effect to the new provisions of national law.<sup>330</sup> Any one of these approaches would result in the dual benefit of (1) minimizing or even eliminating much of the domestic litigation about the existence and scope of form requirements under the New York Convention and (2) bringing the United States into closer conformity with international legal and commercial norms.<sup>331</sup> Now all that is left to be seen is which of the various alternatives the United States will adopt.

<sup>324</sup> See New York Convention, *supra* note 1, art. II(2).

<sup>325</sup> See New York Convention, *supra* note 1; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985); see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538 (1995); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974).

<sup>326</sup> See generally BORN, *supra* note 7, at 606.

<sup>327</sup> See *id.* at 617; see also UNCITRAL Note, *supra* note 12, ¶ 36.

<sup>328</sup> See New York Convention, *supra* note 1, art. II(2); Federal Arbitration Act, 9 U.S.C. § 202 (2011); see also *supra* notes 23–172 and accompanying text.

<sup>329</sup> See New York Convention, *supra* note 1, art. II(2); General Assembly Resolution, *supra* note 239; UNCITRAL Recommendation, *supra* note 14.

<sup>330</sup> See New York Convention, *supra* note 1, arts. II(2), VII(1); Model Arbitration Law, *supra* note 175, art. 7; see also *supra* notes 250–327 and accompanying text.

<sup>331</sup> See New York Convention, *supra* note 1.

